

2005

The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity

John C. Duncan Jr.

University of Oklahoma College of Law, jcduncan@ou.edu

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

John C. Duncan Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 Neb. L. Rev. (2004)

Available at: <https://digitalcommons.unl.edu/nlr/vol83/iss4/7>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity

TABLE OF CONTENTS

I.	Introduction	1241
A.	Exordium	1246
B.	The Definition of a Parent	1247
C.	The Bundle of Common Law Parents' Rights	1248
II.	Children's Rights	1249
A.	The Evolution of the "Best Interest of the Child" Doctrine	1250
B.	The Role of Guardians <i>Ad Litem</i> and Court Appointed Special Advocates	1254
C.	Weaknesses of the "Best Interest of the Child" Doctrine	1254
III.	Those Longstanding Parental Rights and Duties	1255
A.	Parental Right to Custody and Care	1255
1.	The Ultimate Sanction: The Termination of Parental Rights	1257
2.	The Future of Foster Care and Its Threat to Family Integrity	1260
B.	Parental Duty to Provide Discipline	1262
1.	Juvenile Justice—The State, the Parent and the Child	1266

© Copyright held by the NEBRASKA LAW REVIEW.

* Associate Professor of Law, University of Oklahoma College of Law. B.A. with Distinction, DePauw University; M.A., M.S., University of Michigan; M.B.P.A., Southeastern University; J.D., Yale Law School; Ph.D, Stanford. Nationally Clinically Licensed Marriage, Family, and Child Counselor; Texas Certification in Mediation. Much appreciation goes to Barbara Hale for research assistance. Other research assistance appreciation goes to Alyssa Campbell, Kristen Hilty, and Darla Jackson. Acknowledgment for inspiration and ideas is very much due my mother Yvonne A.J. Duncan, B.S., West Virginia State University; M.S.Cs., Boston University and my wife Elizabeth Lunsford Duncan, B.A., Fisk University; J.D., Howard University Law School.

C. Parental Right to Children’s Services and Control of Children’s Wages 1268

D. Parental Right to Make Medical Decisions for Minor Children 1271

1. Abortion, Contraception, and Birth Control Counseling 1273

2. Treatment/Testing for Sexually Transmitted Diseases 1275

3. Parental Consent for Commitment to Mental Health Facilities 1276

4. Caveat: The Irony of the Current Law 1277

E. Divorced Parents: Individual and Parental Rights Are Subject to Forfeiture 1278

IV. The Pendulum—Opposite Ends of the Spectrum: Commentary on Some of the More Extremist Positions 1279

A. Do We Really Need a Bill of Rights for Children? 1279

B. The Other End of the Spectrum: The “Parental Rights Movement” 1282

V. The Ultimate Best Interest of the Child Enures from the Parents’ Reinforcement 1284

A. The Courts and the Right to Family Integrity 1287

B. The Rebuttable Presumption: Parents Are Acting in the Best Interests of Their Children 1288

VI. Some Suggestions and Discussion of the Parents’ Rights and Responsibilities Act 1289

VII. Proposed Family Integrity Act 1290

A. A Proposal for Reform: A Bill to Preserve the Right of Family Integrity 1291

VIII. Conclusion 1294

Appendix: S.B. 984—
The Parental Rights and Responsibilities Bill 1295

I. INTRODUCTION

The status of the American family may well be one of the hottest political and social issues this nation faces as we emerge into the new millennium. Most Americans agree that we are in the midst of a dangerous decline in moral and religious values that threatens the very foundation of our society.¹ The facts are clear: marriage as a social institution is threatened and child well-being is affected.² Children,

1. See JIM WALLIS, WHO SPEAKS FOR GOD? AN ALTERNATIVE TO THE RELIGIOUS RIGHT—A NEW POLITICS OF COMPASSION, COMMUNITY, AND CIVILITY 153 (1996).

2. More than thirty percent of births are now occurring outside of marriage, up from five percent in 1960. The U.S. leads the world in the divorce rate, which has

particularly teenagers, are lacking basic values such as honesty, self-discipline, and a good work ethic.³ In the past thirty years, while the teenage population has remained fairly static, there has been a six-hundred-percent increase in teenager arrests for violent crime; teen suicides have increased more than twenty percent; the number of unmarried teenage mothers has risen three-hundred percent, and the average SAT score has dropped eighty points.⁴ Concomitant with these facts, parents believe that their authority has been seriously undermined and their ability to discipline their children has been severely diminished.⁵

It has been suggested that the cause of this decline may be found in the conflict between our highly valued individual freedoms on the one hand, and the value we place on commitment, community, and stable families on the other hand.⁶ One legal scholar has expressed the modern changes in family law as having moved from a system that once stressed "the unitary aspect of the family" and "fixed pattern[s] of role distribution" to a system that now emphasizes "[t]he separateness and individuality of the persons who are associated in families and marriages."⁷ Similarly, another legal scholar has asserted that family rights "cannot be accurately characterized as the individual rights of any family member."⁸

The United States Supreme Court has treated the family as an "autonomous entity, implicitly recognizing the parental role in pro-

quintupled since 1960. See David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431, 432 (1996). Blankenhorn is President of the nonpartisan Institute of American Values, which organized the Council on Families in America. He describes the current cultural trend to be a movement toward "a post-marriage or post-nuclear family system, where the married couple, mother-father unit will no longer be held up as a dominant cultural ideal and will no longer reflect the empirical reality for all, or even most, children." He contends that this trend must be reversed and marriage as a social institution must be strengthened. *Id.* at 431, 436.

3. See Megan Rosenfeld, *Showdown at the Generation Gap: Survey Finds Today's Children Lack Values, and Parents Deserve Most of the Blame*, WASH. POST, June 26, 1997, at E1. This article reports the results of a survey conducted by Public Agenda, a New York-based nonpartisan public opinion research organization.
4. See DANA MACK, *THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY* 14 (1997).
5. See Rosenfeld, *supra* note 3.
6. See Ellen Goodman, *Rebuilding the Family—Report Aims at Improving Quality, Not Just Length, of Marriage*, HARRISBURG PATRIOT EVENING NEWS, Apr. 11, 1995, at A7.
7. See MACK, *supra* note 4, at 93 n.51, (citing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 102, 103 (1989)). Glendon, a Harvard Law professor, is also a member of the Council on Families in America, mentioned *supra*, note 2.
8. J. Bohl, "Those Privileges Long Recognized": *Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 348 (1994).

tecting the child from state action.”⁹ Rather than looking at the child’s rights independently, the Court recognizes that the child’s parents may assert the child’s rights when those rights are threatened by state action. The Court analyzes the issue in the context of the family’s interest as opposed to the State’s conflicting interest in the welfare of the child.¹⁰ This state–parent conflict is demonstrated in three landmark U.S. Supreme Court decisions that deal with parents’ right to choose the type of education their children receive. In *Meyer v. Nebraska*,¹¹ *Pierce v. Society of Sisters*,¹² and *Wisconsin v. Yoder*,¹³ the Court found that the State’s interest in educating children was not impaired by permitting the parents to choose where their children received their education. If the state’s interests are in some way undermined, then the parents’ interests will prevail.

Contrary to U.S. Supreme Court holdings, legislators and state courts, when creating and applying child welfare laws, have tended to perceive the family as individuals with separate, and frequently conflicting rights, rather than the family as a unit with its own body of rights.¹⁴ Therein lies the problem. While the twentieth century opened with children having virtually no legally recognized rights, it has ended with an almost single-minded legal approach focused strictly on the “best interest of the child.” Many of the early changes were absolutely necessary to protect children from exploitation by both parents and businesses. This Article asserts that the children’s rights movement has been too expansive—particularly in the past thirty years—to the detriment of the American family. The unbridled growth of children’s rights has led to the inevitable diminishment of parental rights. Parents no longer have the autonomy to raise their children in the manner in which the parents deem appropriate. This stripping away of parental authority has, in too many cases, caused parental apathy or confusion resulting in many parents abdicating their responsibilities to the state, or to the children themselves.¹⁵ Parents’ rights have become inferior to the rights of their children. The status of parenthood is no longer valued by American society.¹⁶

9. *Id.* at 341.

10. *Id.*

11. 262 U.S. 390 (1923).

12. 268 U.S. 510 (1925).

13. 406 U.S. 205 (1972).

14. See Bohl, *supra* note 8.

15. For example, some parents refuse to establish and enforce any limits whatsoever for their children, enabling the children to basically do whatever they please; or parents rely on the State to set the limits, *e.g.*, by establishing teen curfews and movie ratings.

16. See MACK, *supra* note 4, at 17. Mack, who interviewed numerous parents while researching her book, concludes that parents believe “that the larger [American] culture no longer supports the family as an inviolate unit engaged in a crucial and worthy task—the task of childrearing.” *Id.*

This trend must be reversed, the pendulum must swing back toward parental rights, although not totally, so that parents may be reinforced in their role as parents. When parental status is restored, parents will be motivated and inspired to carry out their parental duties and responsibilities with confidence and commitment. That which is in the best interest of the parents, generally enures to the best interest of the child. (As a sidenote, my preference is for the less common spelling "enure," and I will use this form here instead of the more widely used "inure.").

As courts and legislators have created newly recognized rights of children, they almost invariably have done so *in the best interest of the child*. Yet, the misuse and overuse of this concept as a legal doctrine has actually resulted in children being further victimized at the hands of the State.¹⁷ As one legal scholar has warned, there are inherent dangers that exist when "objective" judges and other state officials are delegated to be the determiners of the best interest of a child.¹⁸ Such a premise suggests that "good parents" can and should view their children "dispassionately" and "objectively."¹⁹ Passionate, not dispassionate, involvement is required between parent and child.²⁰ Dispassion is more akin to emotional detachment, and clearly not the way we expect parents to relate to their children.²¹ Parents are the best determiners of what is in the best interest of their own children. No one has a better sense of a child's wants, needs, and personality, than his or her own parents. Furthermore, no one cares more passionately about the child and no one has a more vested interest in the child's welfare than the parents.

By continually recognizing more and more rights of children, which frequently contravene the rights of parents, state courts and legislatures have diminished the U.S. Supreme Court holdings that parental rights are fundamental rights.²² The effects of the various state inter-

17. See ROBERT A. BURT, CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 40 (Patricia A. Vardin & Ilene N. Brody eds., 1979). Professor Burt argues that children's rights advocates fail to consider the manifest inadequacies of the State as protector of children, by failing to devote the necessary resources to "work intensively with the parents so that the children's needs to remain with their parents can be respected." *Id.*

18. *Id.* at 47.

19. *Id.*

20. See *id.*

21. See *id.*

22. See e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (asserting that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in the state law but in intrinsic human rights"); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the tradi-

ferences *in the best interest of the child* has brought about a vocal and determined group seeking to codify parental rights, much like children's rights have been codified in various forms.²³ This Article seeks to explain why recent parental rights legislation has encountered opposition and presents a Proposed Bill to Preserve the Right of Family Integrity that will focus on the family as a unit, with parental rights being reinforced, and without jeopardizing the necessary protections granted to children. By examining the historical and legal status of both parents and children in the United States of America from early colonial times through the present, this Article will demonstrate that while parental rights have gradually been stripped away, children's rights have continued to expand. The gravamen of this Article suggests that existing legal policies and practices that fail to recognize the family as a legal entity in and of itself, with its own precious set of rights, have contributed to this nation's family crisis. By considering families as a group of individuals with competing sets of rights, legislatures and the courts are also responsible for the current state of the American family. Part II traces the *best interest of the child* doctrine; where it came from, what it means, and demonstrates how it has been overused and overextended. Part III examines what the legally recognized rights of parents have been in the past and shows how those rights have been threatened, or in some cases, altogether eradicated *in the best interest of the child*. Part IV evaluates the opposing positions of both parental rights advocates and children's rights advocates. The viewpoints and motivations of the recent parental rights movement that seeks to codify parental rights are examined, and an explanation of why these efforts have not been entirely successful will be presented. Part V discusses the problems encountered when the debate becomes polarized and presents proposals directed at strengthening families by empowering parents through the resurrection of the previously recognized, but more recently neglected, "right to family integrity." Part VI presents suggestions for strengthening the proposed Senate Bill 984: The Parental Rights and Responsibilities Bill, in light of preserving family integrity with the best interests of the parents, children, and family as a unit. Part VII proffers a proposed bill on preserving family integrity.

tional interest of parents with respect to the religious upbringing of their children."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing that there is a "private realm of family life which the state cannot enter").

23. See e.g., Indian Child Welfare Act of 1978, 25 U.S.C. § 1901; Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. § 622-625); 42 U.S.C. § 12,301 (2000); Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

A. Exordium

Any legislation directed toward strengthening families must be presented in the context of the American family today, not the American family of the 1950s. In no way should family preservation require a denigration of the rights of women in society, nor children. Instead, legislation should be directed toward empowering all families including single-parent and two-parent families, families with full-time stay-at-home mothers, and families whose mother chooses to work outside the home. Granted, the traditional two-parent family has long been the Judeo-Christian ideal upon which American family law was based, but that ideal has been eroded in recent years.²⁴ In today's legal system, family form has less significance.²⁵ The reality today is that most children are no longer being raised in traditional two-parent families with the father as the breadwinner and the mother as a full-time homemaker. Rather, the majority of children are living in households where both parents work outside the home, or with a single parent, or one parent and a stepparent.²⁶ The stable two-parent family is certainly a worthy ideal and could continue to be society's goal. Studies have consistently shown that children who are raised by both biological parents living together are generally healthier, obtain higher levels of achievement, and exhibit fewer conduct and emotional problems than children brought up in single-parent or stepparent families.²⁷ These studies do not indicate that it is inevitable that children raised in single-parent households are all destined to have serious problems, but they do exhibit a significant risk which may be offset by other factors, such as parental competence, the parental support system, the degree of parental education and income level, and

24. See Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. 489, 499 (1996).

25. See *id.* at 500. Courts no longer distinguish between the rights of married and unmarried parents. Illegitimate children have the same rights to parental support, inheritance, and welfare benefits, as children whose parents were married at the time of birth. *Id.*

Courts have also recognized the parental rights of gay/lesbian parents, step-parents, grandparents, etc. See *e.g.*, *Riddle v. Riddle*, 775 S.W.2d 513 (Ark. App. 1989) (granting visitation rights to stepfather); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (finding no evidence to suggest a correlation between mother's homosexuality and her fitness as a parent); *Doe v. Doe*, 284 S.E.2d 799, 806 (Va. 1981) (rejecting *per se* rule of unfitness of homosexual parents and finding homosexual conduct another important consideration in determining custody).

26. See Younger, *supra* note 24, at 500.

27. Studies such as the National Survey of Children, the National Longitudinal Survey of Youth, the National Health Interview Survey on Child Health, and others have produced generally compatible results. See *Causes of Poverty, with a Focus on Out-of-Wedlock Births: Testimony Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong. 46-49 (1996) (statement of Nicholas Zill, Ph.D., Vice-President and Director, Child and Family Studies, Westat, Inc.).

the emotional stability of the single parent.²⁸ When the two-parent ideal is not possible, society should provide strength and support to other family forms.

B. The Definition of a Parent

Although a parent²⁹ is one who is the "lawful father or mother of someone,"³⁰ the term encompasses so much more today than just the biological aspect of who was responsible for the child's conception and birth. The word "parent" carries the connotation that there is a relationship of mutual love and affection between the parents and the child and that the parents are the individuals who are responsible for child support and maintenance, instruction, discipline, and guidance of the child.³¹ Almost every person who has experienced parenthood could attest that the parent-child bond is one of the most powerful of all human emotions, extremely resilient and not easily severed.

It is equally important to note that a person does not necessarily have to be defined as a parent to have rights equivalent to a parent. A guardian is defined as "[o]ne who has the legal authority and duty to care for another's person or property, especially because of the other's infancy, incapacity, or disability."³² A court may also appoint an individual, often it is an attorney to act as a guardian in a lawsuit, and this is termed a guardian *ad litem*.³³ Guardians have the same legal duties as those of parents, and they often feel some form of love and affection for the child in their care. Today, many grandparents are the primary caregiver for children. According to the American Association

28. *Id.*

29. This Article discusses parents' rights in relation to the best interest of the child. At this time, it is important to mention that biological parents mean the male and female whose biological components produced the child. However, courts have recognized as parents people who are not the biological producers of the child. Whether or not state legislators or courts recognize same-sex marriages and homosexual partners as parents is not at issue in this Article and, as such, will not be discussed. It is an important topic to be discussed as a separate article in light of San Francisco, California granting marriage licenses to same-sex couples. See *San Francisco Challenges State's Same-Sex Marriage Ban in Court*, CNN.COM, Feb. 19, 2004, at <http://www.cnn.com/2004/LAW/02/19/samesex.marriage/index.html>. Several states have also adopted Defense of Marriage Acts, which only allow marriages to be between a male and female. At least thirty-eight states have passed Defense of Marriage Acts. See Kevin R. Corlew, Note, *Not on "Shaky Grounds": Lawrence v. Texas, 123 S. Ct. 2472 (2003), and the Constitutionality of State DOMAs Such as Nebraska's Marriage Provision*, NEB. CONST. art. § 29, 83 NEB. L. REV. 179, 186-87 n.63 (2004) (detailing the status of state laws as of late 2004).

30. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

31. See *Solberg v. Metro. Life Ins. Co.*, 185 N.W.2d 319, 323 (Wis. 1971).

32. BLACK'S LAW DICTIONARY 725 (8th ed. 2004). A guardian is also commonly referred to as a custodian, depending on the jurisdiction.

33. *Id.*

of Retired Persons Grandparent Information Center, in 2001, approximately 4.5 million grandchildren under the age of eighteen resided in grandparent-headed households.³⁴ Not surprisingly, the Supreme Court has already addressed a case, *Troxel v. Granville*,³⁵ on third-party visitation, specifically involving grandparents and grandparent visitation.³⁶

C. The Bundle of Common Law Parents' Rights

Neither the U.S. Constitution nor the Bill of Rights mentions parental rights or the rights of children. However, the United States Supreme Court has found that the right to raise children is a fundamental liberty interest protected by the Fourteenth Amendment.³⁷ Some of the judicially recognized rights included in the bundle of parental rights are the right of parents to the custody and care of their minor children,³⁸ the right to direct their children's moral and religious training,³⁹ the right to establish their children's residence,⁴⁰ the

34. A. KIMBERLY DAYTON ET AL., *ELDER LAW: READINGS, CASES, AND MATERIALS* 542 (2d ed. 2003). See also AARP Website, www.aarp.org (last visited Apr. 8, 2004).

35. 530 U.S. 57 (2000).

36. The Court reasoned that custody, care, and nurture of child reside first with parents, whose primary function and freedom include preparing for obligations that the State can neither supply nor hinder. There is also a presumption that fit parents act in the best interests of their children. However, this reasoning has provided for many state courts to dismiss already awarded grandparent visitation awards and orders. Many state courts have used the *Troxel* Court's holdings to limit the real best interest of the child, because the *Troxel* Court failed to establish any kind of analysis for determining the best interest of the parents. *Id.*

37. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court, in *Prince*, when referencing its prior holdings regarding the right of parents to direct the religious training and upbringing of their children, reinforced its stance on the sanctity of the family:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

321 U.S. at 166 (citations omitted).

And more recently, in *M.L.B. v. S.L.J.*, Justice Ginsburg reiterated the fundamental right to raise children when she stated "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." 519 U.S. at 116 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

38. See, e.g., *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18, 27 (1981).

39. See, e.g., *Pierce*, 260 U.S. at 534, 535; *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978).

40. See, e.g., *Shea v. Shea*, 223 P.2d 32, 32-34 (Cal. App. 1950).

right to the services and earnings of minor children,⁴¹ the right to control and manage minor child's property,⁴² the right to direct the education and religious instruction of their children,⁴³ the right to consent to the minor child's medical treatment,⁴⁴ and the tort doctrine of parental immunity for parents who are negligent in the exercise of their parental duties.⁴⁵ Likewise, courts have charged parents with the duty to discipline their minor children,⁴⁶ and the duty to provide their children with support, education, and protection.⁴⁷ Further discussion *infra* will illustrate how these common law parental rights have been diminished by legislatures and state courts under the auspices of the best interest of the child. The correlation between the diminishment of parental rights, the overextension of children's rights, and the decline of the American family cannot be ignored.

II. CHILDREN'S RIGHTS

While there was no mention of children in the U.S. Constitution nor in the Bill of Rights, children have been granted many of the same rights as adults. This section will demonstrate the evolutionary process beginning with the development of the "best interest of the child" doctrine, the historical role of the parent as protector, and how courts

-
41. See, e.g., *Peot v. Ferraro*, 266 N.W. 2d 586, 588 (Wis. 1978) ("A parent is entitled to a minor child's wages as a matter of right."). The more modern trend, however, is to view the loss of the right to a child's wages and services in the context of a loss of consortium claim. See e.g., *Frank v. Superior Court*, 722 P.2d 955, 959 (Ariz. 1986) (allowing parents to recover for loss of adult child's consortium).
 42. *L.A.M. v. State*, 547 P.2d 827, 835 (Alaska 1976).
 43. Three U.S. Supreme Court cases have addressed the parental right to direct their children's education or activities. See *Pierce*, 268 U.S. at 534-35 (striking down an Oregon compulsory school attendance statute as violative of Amish parent's right to control their children's education); *Meyer v. Nebraska*, 262 U.S. 390, 399 (declaring unconstitutional a state statute prohibiting the instruction of foreign languages in public schools until students have completed the eighth grade); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (permitting Amish parents to remove their children from public school and provide them with vocational training in accordance with Amish community life and religious beliefs).
 44. See, e.g., *Matter of Hofbauer*, 393 N.E.2d 1009 (N.Y. 1979).
 45. See, e.g., *Commerce Bank v. Augsburgers*, 680 N.E.2d 822, 823 (Ill. App. 1997) (extending the doctrine of parental immunity to foster parents, because here the charge of negligence arose out of foster parents' supervision and discipline of the child).
 46. See, e.g., *Niewiadomski v. U.S.*, 159 F.2d 683, 686 (6th Cir. 1947), *cert. denied*, 331 U.S. 850 (1947). This case dealt with the right of a person *in loco parentis* to receive life insurance benefits. But addressing parental rights in general the court stated that "[a]t common law a parent is charged with the duty of educating and supporting a minor child, . . . together with the authority to take such disciplinary measures as are reasonably necessary to discharge the parental duty." *Id.* at 686.
 47. See, e.g., *In Interest of George*, 794 S.W.2d 875, 878 (Tex. Ct. App. 1990) (interpreting a Texas Family Code provision concerning duties of parents).

and lawmakers have overextended the "best interest of the child" doctrine to the detriment of parental authority.

A. The Evolution of the "Best Interest of the Child" Doctrine

The "best interest of the child" doctrine is not a new legal concept. Courts have been using the phrase for years both in legal rulings and *dicta*. When early American courts were called upon to adjudicate child custody disputes, the best interest of the child was frequently mentioned as a primary consideration to support the court's application of, or deviation from, the general rule of the period.

American child custody law evolved from the European view of "absolute paternal power,"⁴⁸ to a presumption in favor of the mother for children of tender years,⁴⁹ to a general maternal preference.⁵⁰ Around 1960, maternal preference began to be pushed aside as a new best interest of the child standard took hold.⁵¹ By 1970, when society began responding to gender inequities exposed by feminists, most states began to adopt no-fault divorce laws and remove the gender-based bias in custody decisions.⁵² The changing statutes, coupled with an enlightened judiciary regarding various psychological theories being promulgated by social scientists, resulted in the development of two opposing models of child custody, both purporting to be in the best interest of the child.⁵³

The first of these was the primary caretaker theory, based upon the influential work published in 1973, *Beyond the Best Interests of the Child*.⁵⁴ This book was the product of three experts from different disciplines: legal scholar Joseph Goldstein, child analyst Anna Freud, and psychiatrist Albert Solnit. Their theory asserted that the parent who fulfilled the primary childcare functions, although this need not necessarily be the mother, should become the sole custodian of the child.⁵⁵ The primary caretaker, or the "psychological parent," is the person who has had the majority of the "day-to-day interaction, companionship, and shared experiences" with the child and could be "a

48. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, in CHILD, PARENT & STATE: LAW AND POLICY READER 3, 4 (S. Randall Humm et al. eds., 1994).

49. The tender-years doctrine created a rebuttable presumption in favor of granting custody to mothers of young children, reflecting a stereotype that a mother's nurture would provide a young child with the healthiest development. *Id.* at 7.

50. *Id.*

51. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 121, 122 (1994).

52. See *id.* at 125.

53. See *id.* at 167, 168.

54. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

55. See MASON, *supra* note 51, at 168.

biological parent or an adoptive parent or any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.”⁵⁶ This is the person with whom the child has formed the closest bond.⁵⁷ One particularly controversial aspect of this theory, although it never received judicial acceptance, was that the psychological parent should be granted the complete and exclusive custody of the child, with sole control over all decisions regarding the welfare of the child—including the decision to deny access to the noncustodial parent.⁵⁸

As the primary caretaker doctrine was gaining acceptance and recognition, another conflicting model emerged—a joint custody model—that stressed the importance of the presence of both parents in the child’s development.⁵⁹ This model was first introduced in California in 1980.⁶⁰ Swiftly gaining approval by the courts, it seemed to offer the ideal solution: judges could render decisions *in the best interest of the child* without appearing to favor one parent over the other.⁶¹ By 1988, thirty-six other states had followed California’s great experiment.⁶²

Clearly the use and acceptance of two directly opposing models, both of which are purported to be in the best interest of the child, leaves little doubt that there has been no clear-cut means of determining the best interest of a child. While some states have provided a list of factors to be considered by the courts, other states have granted broad judicial discretion.⁶³ Regardless, there seems to be no agree-

56. GOLDSTEIN ET AL., *supra* note 54, at 17, 19. The authors further assert:

Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. . . . What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.

Id. at 12–13.

57. See MASON, *supra* note 51, at 168, 169.

58. See *id.* at 168, 169.

59. See *id.* at 170.

60. See *id.* at 130.

61. See *id.*

62. See *id.* at 131. Mason refers to this preference as an experiment, because by the time it was widely used, several unanticipated problems were noted, *e.g.*, the convoluted schedules imposed on the children and an intensified degree of parental conflict. *Id.* at 130, 131.

63. See Charlow, *supra* note 48. See *e.g.*, OHIO REV. CODE ANN. § 3109.04(f)(1)(c)–(e) (Anderson 2003) (“[t]he child’s interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child’s best interest; [t]he child’s adjustment to his home, school, and community; [t]he mental and physical health of all persons involved in the situation”). For a broader, less precise example, see N.C. GEN. STAT. § 50-13.2(a) (1987) (“An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. An order for custody must include findings

ment on what the words truly mean. The term is vague, illusive, and subject to myriad interpretations. Nonetheless, it has become the universal standard used today in adjudicating custody battles between biological parents, and between a parent and a third party upon a finding that a parent is unfit.⁶⁴

While the best interest of the child standard used today to resolve custody disputes is arguably preferable to the rigid and inflexible rules of the past, the actual application of the doctrine has failed to achieve its theoretical purpose.⁶⁵ Child custody law simply cannot ignore the constitutional protections provided to the parents.⁶⁶

Synchroneal with the exploding divorce rate, single-parent families—usually headed by mothers living in poverty—became the new underprivileged class in America.⁶⁷ Mindful of the growing popularity of the best interests of children, the states began to take an even more active role as “superparent” by dictating stricter standards of behavior for poor families.⁶⁸ Social service agencies “vigilantly supervised the behavior of those it supported,” using the threat of removal and termination of parental rights for parents who did not conform.⁶⁹

The newly extolled best interest of the child standard was not reserved for resolving child custody matters, but became the maxim for virtually every aspect of the burgeoning children's rights movement. One legal scholar has aptly characterized the best interest of the child application as a judicial or quasi-judicial determination of whether society's view of the best interest of the child (as represented by the State), outweighs the parental interest in making that determination.⁷⁰

of fact which support the determination of what is in the best interest of the child.”). Charlow proposes that a best interest of the child determination be made by a court considering which parent is the most reasonable parent, *i.e.*, the parent who is most willing to avoid conflict and put aside his or her own interest, is the parent who has the best interest of the child in mind. A “most reasonable parent rule” would minimize the number of disputes that actually go to trial, and at trial, the burden would be on the parents to show why they could not agree. The parent who has acted most unreasonably, in the opinion of the court, will not be granted custody. Charlow, *supra* note 48, at 12–17.

64. See Gary M. Miller, Note, *Balancing the Welfare of Children with the Rights of Parents: Peterson v. Rogers and the Role of Religion in Custody Disputes*, 73 N.C. L. Rev. 1271, 1278 n.61 (1995).

65. See Charlow, *supra* note 48, at 4.

66. See Miller, *supra* note 64, at 1280. Miller argues that when courts make a best interest determination, they could be infringing on a parent's constitutionally protected religious freedom if a preference for one parent's religious practice prevails over the others.

67. MASON, *supra* note 51, at 122.

68. *Id.*

69. *Id.*

70. See Elizabeth J. Sher, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. Rev. 157, 169 (1983).

The current children's rights movement has brought children a number of newly recognized rights, through legislation or judicial decision, that had previously been unnecessary. When the first juvenile court was established in 1899, it was founded upon the premise that it would be in a child's best interest if the State would operate specialized courts, the purpose of which would be to provide state guidance in the form of rehabilitation rather than punishment.⁷¹ Since these courts were ostensibly operating *in the best interest of children*, a great many procedural safeguards were considered unnecessary.⁷² Eventually, the United States Supreme Court held that certain procedural safeguards were indeed necessary. The landmark decision of *In re Gault*⁷³ dealt with a fifteen-year-old who had been committed to a state rehabilitation institution for six years after having been found guilty of making obscene phone calls, an offense that carried a maximum of two months jail time for an adult. Here, the Court extended the due process clause of the Fourteenth Amendment to juvenile court proceedings.⁷⁴

Gault is representative of the beginning of an entirely new era in children's rights.⁷⁵ As will be further evinced in the discussion that follows, the rights of children quickly extended beyond the juvenile court process.⁷⁶ While matters concerning family have always traditionally been a matter of state concern, the past two decades have produced a plethora of federal legislation promulgated in the interest of children.⁷⁷

71. CHILD, PARENT & STATE: LAW AND POLICY READER xxi (S. Randall Humm et al. eds., 1994).

72. See *id.*

73. 387 U.S. 1, 9-10 (1967).

74. See *id.* at 19. Some juvenile court due process limitations remained, however, as evinced by the Court's refusal, four years later, to extend the right to a trial by jury to delinquency hearings. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality opinion) (reasoning that if juveniles were granted the right to a jury trial in delinquency proceedings, then there would be no need for juvenile courts, since they would, in effect, be the same as other criminal courts).

75. LEGAL RIGHTS OF CHILDREN § 1.03, at 12 (Donald T. Kramer ed., 2d ed. 1994).

76. See *id.* § 1.04, at 15.

77. See *id.* § 1.04, at 16-17. Kramer includes a partial listing of some of the federal laws pertaining to children:

[T]he Bilingual Education Act of 1988, the Adoption Assistance and Child Welfare Act of 1980, the Child Support Enforcement Amendments of 1984, the Child Support Enforcement Program, the Child Victims' and Child Witnesses' Rights Act of 1990, the Food Stamp Program and the National School Lunch Program, the Fair Housing Amendments Act of 1988, the Education for All Handicapped Children Act (now mostly superseded by the Individuals with Disabilities Education Act of 1990), the Family Education Rights and Privacy Act, the Child Sexual Abuse and Pornography Act of 1986, the Federal Protection of Children Against Sexual Exploitation Act, the Abandoned Infants Assistance Act of 1988, the Elementary and Secondary School Improvement Amendments of

B. The Role of Guardians *Ad Litem* and Court Appointed Special Advocates

Gault, and the Court's recognition of the necessity of protecting children's best interests by granting them certain procedural due process rights, led to the development of two new, and closely related, legal mechanisms for protecting children's rights: guardians *ad litem* and Court Appointed Special Advocates ("CASAs").⁷⁸ Initially, a number of states passed statutes granting a child the right to legal representation in cases of abuse or neglect, but by 1973, only two states required guardians *ad litem* in every case of child abuse.⁷⁹ In the following year, this area of the law began an era of rapid expansion after the federal government passed a statute creating the National Center on Child Abuse and Neglect ("NCCAN").⁸⁰ NCCAN was responsible for allocating federal grants to states that complied with federal guidelines regarding child abuse and neglect programs.⁸¹ One of these guidelines required states to appoint guardians *ad litem* in every civil or criminal proceeding involving child abuse.⁸²

C. Weaknesses of the "Best Interest of the Child" Doctrine

The illusive "best interest of the child" has become a cliché. Without a concrete legal definition, it has been subject to overuse and misuse. Too often, the "best interest of the child" is determined by dispassionate third parties relying on empirical data gathered by social scientists. Furthermore, judges bring a certain amount of bias to the rulings they make based upon their own propensities.⁸³ Some legal scholars argue that the best interest of the child is an ideal that

1988, the Indian Child Welfare Act, the Runaway and Homeless Youth Act, the Child Abuse Prevention and Treatment and Adoption Reform Act, the School Dropout Demonstration Assistance Act of 1988, the Juvenile Justice and Delinquency Prevention Act, the Missing Children Act and the Missing Children's Assistance Act of 1984, the Victims of Child Abuse Act of 1990, and the Parental Kidnapping Prevention Act of 1980.

Id.

78. JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 114 (1991).

79. Robert S. Shepard, Jr. & Sharon S. England, "I Know the Child is My Client, But Who Am I?", 64 *FORDHAM L. REV.* 1917, 1920 (1996).

80. *See id.* at 1920-21.

81. *See id.* at 1921.

82. *See id.*

83. *See, e.g., Painter v. Bannister*, 140 N.W.2d 152, 154, 156 (Iowa 1966) (overturning lower court's decision to award custody to father over claims of maternal grandparents, indicating that although both parties were fit, the father's lifestyle was "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating," but the grandparents were "stable, dependable, conventional, middle-class, middlewest background").

should not be taken too literally.⁸⁴ In the articulately stated argument of another legal scholar:

[C]hildren cannot be adequately or even sensibly protected by giving them rights that state officials will enforce against parents. Children can only be protected by giving them parents. The children's rights movement today is ignoring this simple homely truth, and thus dis-serving the best interests of children.⁸⁵

Courts have further weakened the best interest of the child standard by providing different applications of the standard. Many courts apply the standard only in certain situations or after a certain number of elements are present, while other courts immediately apply the standard "under the presumption that the child's best interests are the paramount consideration."⁸⁶ "Courts and scholars also disagree on the factors to be used and weight to be given to the rights in the balance."⁸⁷

III. THOSE LONGSTANDING PARENTAL RIGHTS AND DUTIES

As the "best interest of the child" doctrine gained a stronghold in American legal thought, the rights of parents gradually have been eroding. This Part will compare the common law parental rights and duties recognized by early American courts with the rights and duties of parents today. This comparison will illustrate how, as children have been granted additional rights, the rights of parents to rear their children in the manner they deem appropriate have been compromised.

A. Parental Right to Custody and Care

During the formative years of American society, patriarchal rule was still the dominant cultural practice of Western civilization. Under English common law, the father was the ruler of the family, with supreme power over his children, such power limited only in rare

84. HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 788 (2d ed. 1988).

85. BURT, *supra* note 17, at 51.

86. Elizabeth P. Miller, Note, *Deboer v. Schmidt and Twigg v. Mays: Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 508 (1994).

87. *Id.* at 509. Miller also mentions that "state statutes rarely specify the factors to be considered in determining the best interests of the child." *Id.* (quoting VINCENT D. FRANCIS, *TERMINATION OF PARENTAL RIGHTS—BALANCING THE EQUITIES* 8 (1971)). She raises the argument of "generic language" not providing courts and parties with clear interpretation so that the standard often has different meaning to different people. *Id.* at 509. See also Gloria Christopherson, *Minnesota Developments, Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings*: In re J.J.B., 71 MINN. L. REV. 1263 (1987).

and extreme cases by the power of the State.⁸⁸ This patriarchal system flowed from the generally accepted Christian belief that man was the head of the household.⁸⁹ In colonial America and through the period of early statehood, mothers were usually responsible for the infant child who was nursing, but then abdicated much of the childcare responsibility to the father once the child was weaned. Fathers were not only responsible for making the decisions regarding the child's welfare and education, but were usually active participants in the typical day-to-day activities involving the child.⁹⁰

In rare cases of divorce, and as a consequence of our patriarchal beliefs, a mother generally had no right to the custody of the children, unless she could prove wrongful conduct on the part of the father.⁹¹ Legally, fathers were considered to be the "natural guardian, invested by God and the law of the country with reasonable power over [the children]."⁹² As previously mentioned, it was not until the end of the nineteenth century that child custody decisions began to apply a maternal preference.⁹³

By the twentieth century, mother's rights had gained some recognition, but generally only in the context of custody decisionmaking.⁹⁴ The early common-law concept that the totality of family rights was

88. See R. Collin Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25, 30-44 (1981). This article gives a comprehensive analysis of the development of child custody laws.

89. See MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD* 46 (1993). Berry asserts that this patriarchal standard was founded upon the belief "that women were sinful and moral inferiors, a belief deeply rooted in the Bible and the story of Adam and Eve." *Id.* Since women were corrupt by nature, fathers were therefore the better parent for overseeing the children's development.

90. See *id.* at 45.

91. See Miller, *supra* note 64, at 1278.

92. See, e.g., *Prather v. Prather*, 4 S.C. Eq. 33 (4 Des.) (1809). In this renegade decision, Chancellor Desaussure acknowledged the rights of the mother "to the comfort of her children's society occasionally; and the court will protect her in the enjoyment of it." *Id.* at 39. The mother was granted what today would be known as visitation rights to the older children, but was given custody of the nursing child. *Id.* at 44.

93. See Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389, 391 (1996).

94. In other cases, the vestiges of the patriarchal system were still apparent. In a criminal case brought against a father's agents for removing his child from his estranged wife's custody, the court held that the father's house "is the proper residence of the family. . . . His authority over his children is superior to that of their mother so long as they may reside together as husband and wife." *State v. Elliott*, 131 So. 28, 30 (La. 1930). In a different type of case that dealt with a contested inheritance, the court held that on the death of the father it is the right and duty of the mother to exercise authority over her children. *Cravens v. Cravens*, 61 S.W.2d 730, 740 (Mo. 1933).

vested in the husband by reason of such doctrines as that of marital unity of husband and wife and family unity of parent and child was swept away by modern legislation.⁹⁵ Eventually, and most likely as a result of the woman's suffrage movement and the newly recognized rights of women in general, courts began to recognize the rights of both parents without reference to the parents' gender. By 1944, in *Prince v. Massachusetts*,⁹⁶ an eminently germane decision to the topic at hand, the United States Supreme Court recognized the sanctity of family rights by acknowledging that

the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.⁹⁷

1. *The Ultimate Sanction: The Termination of Parental Rights*

Parental rights have never been absolute and are subject to state intervention for parental abuse and neglect. When the safety and welfare of a child is threatened, the State has the power to intervene under the doctrine of *parens patriae*, literally interpreted as "the State is the parent." The various state statutes that authorize the involuntary termination of parental rights are extremely diverse, making it difficult to determine any type of national consensus.⁹⁸ Major differences are found in the manner in which various state agencies define the terms abuse and neglect. The state must intervene when there is clear and convincing evidence⁹⁹ that children have been subjected to chronic physical or sexual abuse, torture, or abandonment. While bro-

95. *Miller v. Monsen*, 37 N.W.2d 543, 548 (Minn. 1949).

96. 321 U.S. 158 (1944).

97. *Id.* at 166 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

98. See CLARK, *supra* note 84, at 894.

99. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring that all states use a clear and convincing standard of proof, *i.e.*, more than a preponderance of the evidence but less than the beyond-a-reasonable-doubt standard required in criminal proceedings, when seeking a termination of parental rights). In the *Santosky* case, social services removed three children from the Santosky home and placed them in foster care after a finding of neglect. The lower court found that, although the Santoskys had maintained contact with the children, the visits were "superficial." *Id.* at 751. The judge then terminated their parental rights upon concluding that the Santoskys were not capable of planning for their children's future, even with public assistance. The New York appellate court affirmed by attempting to balance the children's rights against the parents' rights, but the U.S. Supreme Court overruled. The Court reasoned that the parents' right to custody is an interest "more precious than property rights" and thus required a higher standard of proof. *Santosky* noted that thirty other states already required the clear and convincing standard either by statute or court decision. *Id.* at 749 n.3. As one commentator has observed, the *Santosky* ruling does very little to protect parental rights, since it did not overrule *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1981), decided the previous year, holding that states

ken bones and serious bruises may serve as evidence of severe physical abuse, other types of abuse and neglect are more difficult to discern.¹⁰⁰ Hence, there is serious danger of imposing middle-class standards upon families living in poverty. In a 1971 California case, Social Services attempted to remove all but the eldest child from the family home based upon a statute that authorized state intervention and removal of the children if the "home has become an unkempt and unsanitary place of living."¹⁰¹ After two years of state supervision, the family continued to live in a filthy house, the children were dirty, and one child had lice. The parents asserted in their defense that they were overweight, in poor health and unable to keep the house clean, but they loved their children nonetheless. A social worker also testified that the parent-child relationship was intact, the children were healthy and happy, and there was no evidence of cruelty. The trial court still removed the children from the home for one year, and this decision was affirmed on appeal.¹⁰² The basis for this decision was the "best interests" doctrine justified by the court's discretionary power: "The unfitness of a home for a particular child . . . is a relative concept and it cannot be determined except by judicial appraisal of all available evidence bearing on the child's best interests"¹⁰³

Removal and termination statutes are often worded in a manner that allows for a great deal of judicial discretion in determining what is in the best interest of the child, thereby permitting judges to make subjective decisions based upon a white, middle-class, perspective.¹⁰⁴ While some states have held that neglect, dependency, deprivation, and non-support are adequate grounds for termination of parental rights,¹⁰⁵ others have held that custody may only be forfeited to a third person by proof that the parent is unfit.¹⁰⁶ A charge of parental

need not provide counsel for children or indigent parents in termination proceedings. See CLARK, *supra* note 84, at 867.

100. See MASON, *supra* note 51, at 151.

101. In the Matter of Deborah G., Georgia G., Bruce G., and Elizabeth G., 2d Civ. No. 40391 (Cal. Ct. App. June 29, 1973) (unpublished decision), *quoted in* MASON, *supra* note 51, at 151 n.97.

102. *Id.* at 153. Mason notes that the statute was later modified and the language regarding unsanitary conditions was removed. See *id.* at 151 n.99.

103. MACK, *supra* note 4, at 85 (quoting ROBERT H. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 506-09 (New York: Little, Brown 1978)).

104. See Bohl, *supra* note 8. Bohl presents a credible argument for requiring proof beyond a reasonable doubt in termination proceedings.

105. See, e.g., ALASKA STAT. § 47.10.010 (Michie 2004); CAL. FAM. CODE § 7822-27 (West 2004).

106. See, e.g., *Roche v. Roche*, 152 P.2d 999, 1000 (Cal. 1944) (reversing lower court decision that granted custody to paternal grandparents absent proof that the child's father was unfit) (citing *In re White*, 129 P.2d 706, 708 (Cal. App. 1942)).

The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can

neglect undoubtedly provides states with the most power to make arbitrary, or middle-class value-based decisions.¹⁰⁷

Since states have the option of intervening in cases of alleged child abuse under the civil child welfare proceedings and concurrently prosecute under the criminal statutes, there is a significant risk that the two separate proceedings will produce conflicting, anomalous, and irreconcilable results. Although the United States Supreme Court has required that states must use the clear and convincing standard of proof to terminate parental rights,¹⁰⁸ the criminal charges will always require proof beyond a reasonable doubt.

In one Texas case that received the attention of the national media, the two proceedings did indeed produce anomalous results.¹⁰⁹ This judicial travesty began in 1989 when Mr. Krasniqi took his then 5-year-old daughter with him to watch his 9-year-old son compete in a *tae kwon do* tournament. The Krasniqi parents were Albanian immigrants who practiced the Muslim faith and had a limited command of English. Another tournament spectator, seated behind Mr. Krasniqi and his daughter, claimed to have seen the father rubbing his daughter in an unacceptable and inappropriate sexual manner. Several other people, including a civilian employee of the local police department, confirmed the allegations. The children were subsequently placed in foster care with a Christian family. In the April 1990 civil proceeding, following a three-day trial, a jury found that there was clear and convincing evidence of abuse and terminated both parents' rights to their children.¹¹⁰ Efforts to appeal failed mainly on procedural grounds.¹¹¹ Meanwhile, the children's foster family began adop-

give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child.

Id. But one commentator contends that the "unfitness" of a parent is the least precise grounds for termination, and the most capable of confusion, since unfitness refers to a condition of the parent, whereas neglect refers to the child's state. See CLARK, *supra* note 84, at 903.

107. See, e.g., JKC v. Fountain County Dep't. of Pub. Welfare, 470 N.E.2d 88 (Ind. App. 1984) (involving the removal of two children from parents who were frequently unemployed).
108. See Santosky v. Kramer, 455 U.S. 745, 749 (1982) (noting that a few states do require the beyond-a-reasonable-doubt standard before parental rights are terminated).
109. Sherry Jacobson, *Questions Persist in Adoption of Muslim Family's 2 Children*, DALLAS MORNING NEWS, Nov. 29, 1995, at 1A.
110. Mrs. Krasniqi lost her parental rights for defying a court order by taking her daughter to visit the father at the family business, although Mrs. Krasniqi testified that she misunderstood the order, thinking that visits with the father were permissible if Mrs. Krasniqi was also present. See *id.*
111. See Krasniqi v. Dallas County Child Protective Serv., 809 S.W.2d 927 (Tex. Ct. App. 1991), *cert. denied*, 503 U.S. 1006 (1992), and *cert. denied*, 504 U.S. 940 (1992).

tion proceedings. The adoptions were not finalized until 1994, but two years earlier, in February 1992, the criminal proceedings had resulted in a jury deadlock when the prosecution was unable to convince the jury that Mr. Krasniqi was guilty beyond a reasonable doubt of child sexual abuse. Two years later, the trial court rendered a not guilty verdict based upon the convincing testimony of an expert in Albanian culture.¹¹² But that was too late for the Krasniqis, whose efforts to regain custody of their children have been unsuccessful and their legal bills have surpassed \$200,000.00.

2. *The Future of Foster Care and Its Threat to Family Integrity*

Foster care policies in the United States initially focused on removing children from an unsafe environment and providing a safe place for children to live until they could eventually be reunited with their families. As a last resort, if reunification was not possible, parental rights could be terminated and the children would be placed for adoption. In efforts to reform the foster care system and alleviate the problem of too many children remaining in foster care limbo indefinitely,¹¹³ Congress passed the Adoption Assistance and Child Welfare Act of 1980.¹¹⁴ The Act provides federal funds to states that comply with federal edicts requiring preventive and reunification services directed at keeping families together.¹¹⁵

More recently, however, under the guise of protecting children and promoting children's rights, politicians have embraced additional re-

112. The cultural expert spent several hours interviewing Mr. Krasniqi, and she was convinced that he could not have been guilty of sexual abuse of his daughter. Child sexual abuse is unheard of in Albania. Mr. Krasniqi was showing affection by patting his daughter's buttocks. See Jacobson, *supra* note 109.

113. This legislation may have developed as a response to the ruling in *Smith v. Organization of Foster Families for Equality and Reforms*, 431 U.S. 816 (1977) (upholding state procedures that permitted the State to remove a foster child from the foster family with minimal notice, while acknowledging that children may have developed an emotional bond with foster family). *Smith* reasoned that the foster family was created by state law, and thus the State already had a necessary involvement with the family, as distinguished from natural families, which are formed under an intrinsic human right. See *id.* at 836.

114. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

115. For a comprehensive analysis on the effects of the federal law, see Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995). Professor Guggenheim maintains that this federal law has induced states to take a more aggressive approach in terminating parental rights and that children are now "in a worse position than they were in before these reforms were passed. . . . [and] in an increasing number of cases, states are destroying the legal relationship between parents and children for no good purpose and . . . as a result, a record number of children have become legal orphans." *Id.* at 121-22.

forms that will further deny parents the right to custody and control over their children. This even more severe approach seeks to encourage states to terminate parental rights even more swiftly. Rather than pursuing reunification of the family as in the best interest of the child, the new approach is geared more toward developing a permanency plan for the child.¹¹⁶ The Adoption Promotion Act further reduced the amount of time that states may devote to reuniting a family and award "adoption incentive payments" to states based on the number of foster children whose parental rights are successfully terminated and who are subsequently adopted by new families.¹¹⁷

Congress is overlooking the fact that the best interests of the child are most often fulfilled by the eventual reunification of families in crisis.¹¹⁸ The family of origin has provided the child's source of identity;

116. The proposed changes to the Adoption Assistance and Child Welfare Act introduce language that will require the State to decide a permanent living arrangement for the child. The State must present a "permanency plan" at the child's "permanency hearing" (formally called a dispositional hearing). The permanency plan will include "whether, and if applicable when, the child will be returned to the parent, placed for adoption, and the State will file a petition for termination of parental rights, or referred for legal guardianship, or . . . placed in another planned permanent living arrangement." H.R. REP. NO. 105-77, at 13 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2745 (House Report of the Ways and Means Committee to accompany H.R. 867, 105th Cong. (1997), codified as amended at 42 U.S.C. § 670(5)(C) (2000)).

117. See H.R. 867, 105th Cong. (1997). This bill was passed by an overwhelming majority (416-5) in the House of Representatives on April 30, 1997. Congresswoman Mink of Hawaii was one of the few who expressed opposition to the bill. She argued that the bill does not protect the rights of poor parents, and in light of the welfare reform bill passed in 1996, there will undoubtedly be an increased number of parents who will be unable to provide for their young children. She asserted that she could not vote for a bill that results in:

the final penalty of poverty: The loss of ones' children by edict of the Government. First you take their money away. Then you force them into desperate conditions of poverty. Then you deem them unfit to raise their children and you remove them from the home and place them in foster homes. Then after 18 months you put the children up for adoption.

143 CONG. REC. H2023 (daily ed. Apr. 30, 1997) (statement of Rep. Mink).

The Senate version of the bill (SAFEACT) differs from the House Bill in that it does not mandate that states initiate termination proceedings along certain prescribed timelines, but allows termination proceedings only after reasonable efforts at reunification have been made, the case plan is for adoption (not foster care limbo), and a court makes the determination that reunification is not in the best interests of the child.

118. Family-Based Services ("FBS") uses an entirely different approach than the adversarial method that child welfare services use today. Most child welfare agencies are based on the assumption that children are victims and it is the role of child welfare to protect children from incompetent parenting. A drastically different and immeasurably more beneficial method is to look at the family as a unit, and thus the best way to help a child is to strengthen and empower the family. FBS is a solution-based approach which seeks to provide intense family therapy that teaches families techniques to deal with crisis and how to formulate

no other love will substitute for that which the child believes would be bestowed by his or her parents.¹¹⁹ Even when parents have failed to provide adequate care and protection, the child has nonetheless developed a special psychological connection to them. Children who are permanently removed from their families, and placed in a new permanent family without being permitted to maintain contact with the original family, experience grief-like emotions, similar to the death of a loved one.¹²⁰ These children are far more likely to suffer from distress associated to the loss, in addition to anxiety and fear that they too could be forever banished like their parents.¹²¹ The psychological effects of being torn away from one's parents, and/or one's siblings, by the State can have long-term ramifications that often emerge as difficulty coping throughout the person's life.¹²² These emotions may continually surface as the child grows to adulthood and experiences the normal transitions of life, such as adolescence, marriage, childbirth, deaths, or divorce.¹²³

B. Parental Duty to Provide Discipline

Discipline has always been a controversial issue, but the relatively recent movement aimed at protecting children who are victims of abuse has brought about the creation of groups such as the National Commission for Prevention of Child Abuse, who advocate for the complete elimination of corporal punishment. These social reformers, or "child welfare experts," assert that all corporal punishment must be outlawed. It is an ineffective form of discipline which does nothing but

solutions. See INSOO KIM BERG, *FAMILY-BASED SERVICES* (1994). This book serves as a social worker's guide to providing FBS.

119. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 409 (1996). Johnson presents a persuasive argument for allowing children to maintain contact and a relationship with their family of origin, even when those families are unable to properly care for the children. Prohibiting contact will have a negative impact on the child, either because the absent parent will be idolized in the child's mind, thus posing a barrier to the formation of new familial bonds, or if the absent parents are denigrated in the child's mind, there will be a negative impact on the child's self-esteem. See *id.* at 408.

120. See *id.* at 414.

121. See *id.* at 415.

122. In a letter published by advice columnist Ann Landers; a reader expressed anger at being denied the family closeness that was taken from her several years ago by "the system, social service, and child protective agencies" when she and her five siblings were placed in separate foster homes. According to the writer, all the children grew to be "hopeless drunks, as though [they] had set out to deliberately destroy themselves." She now resents the efforts her foster family made to "obliterate my past and transform me into a totally different person." Letter to advice columnist Ann Landers, DALLAS MORNING NEWS, June 11, 1997, at 2C.

123. See Johnson, *supra* note 119, at 414.

teach children that violence is an acceptable form of solving problems¹²⁴ and thus should not be condoned by our culture.

The corporal punishment debate is not unique to the United States. Six countries have passed legislation prohibiting parents from using corporal punishment.¹²⁵ Sweden was the first country to pass such legislation in 1979, against the vast majority of public opinion. Since the law became a part of the Swedish civil code, rather than the criminal code, parents in violation are not subjected to any type of criminal penalty. Nevertheless, regardless of its largely symbolic form, supporters of the law believe it sends a necessary social message and credit it with success in breaking the inter-generational cycle of abuse.¹²⁶

In spite of the criticisms, corporal punishment, or the use of physical force as a form of discipline, is deeply rooted in Western culture and is sanctioned by the Old Testament.¹²⁷ The majority of Americans still believe that parents must have the option of using corporal punishment in order to raise children effectively.¹²⁸ They believe that reasonable corporal punishment builds character, serves as a deterrent for future acts of bad behavior and teaches children to obey and respect authority.¹²⁹

Corporal punishment is still permitted in every state, either under state statute or common law.¹³⁰ But in spite of its legality, parents are confused and uncertain because of the extent of state involvement in this realm of family life.¹³¹ Many parents believe that the influence of child welfare authorities, which begins as soon as children enter public schools, is destructive to family life.¹³² Children are given lists of their rights, told to report parents who spank, and are even taught that verbal discipline can be "abusive."¹³³

124. VINCENT J. FONTANA, M.D. & VALERIE MOOLMAN, *SAVE THE FAMILY, SAVE THE CHILD* 104 (1991).

125. These countries are: Sweden, Austria, Denmark, Finland, Poland, and Norway. See Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 1018-19 (1996).

126. See *id.* at 1018.

127. See e.g., *Proverbs* 23:12-14 ("Withhold not correction from the child; for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell."). We often hear many adults say they appreciate the strong discipline they received as a child. They feel as adults that they deserved the spankings. Perhaps many adults (parents) feel this way as they have their own children.

128. See Edwards, *supra* note 125, at 984.

129. See *id.* at 990.

130. See *id.* at 984.

131. See MACK, *supra* note 4, at 20.

132. See *id.* at 19.

133. *Id.* at 20.

While the position of American jurisprudence has been to recognize that parents are privileged to use reasonable force when necessary to maintain proper control and training of the child,¹³⁴ such a right has its limitations. A parent is not permitted to "punish with undue severity or cruelty, or only because he is angered with the child," but the parent must act with the best interest of the child in mind.¹³⁵

Of course, when punishment is reasonable versus when it becomes cruel and excessive is not always crystal clear. Most courts use broad language that allows for fact-specific application of the general rule. For example, one court has asserted that a parent has the legally recognized "authority to take such disciplinary measures as are reasonably necessary to discharge the parental duty."¹³⁶ Therefore, it is up to the courts to determine when parents have exceeded the boundaries of reasonable punishment, and when they should be charged with criminal child abuse.

Part of the difficulty in making these types of determinations arises because social policies and beliefs change over time and frequently vary from jurisdiction to jurisdiction. The corporal punishment produced by our parents would very likely be considered cruel and excessive punishment today, but yet it was probably not nearly as severe as the punishments our parents endured at the hands of our grandparents. This social and cultural evolution is so perfectly manifested by contrasting an 1886 case from North Carolina with a 1980 case from the State of Washington. The North Carolina appellate court took notice of the following facts:

134. The *Restatement (Second) of Torts* states: "A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training or education." *RESTATEMENT (SECOND) OF TORTS* § 147(1) (1965). Section 150 lists the following factors which should be used in determining whether the punishment was reasonable:

- (a) whether the actor is a parent;
- (b) age, sex, and physical and mental condition of the child;
- (c) the nature of the offense and his apparent motive;
- (d) the influence of his example upon other children of the same family or group;
- (e) whether the force or confinement is necessary and appropriate to compel obedience to a proper command; and
- (f) whether it is disproportionate to the offense, unnecessarily degrading or likely to cause serious or permanent harm.

Id. § 150.

135. *State v. Fischer*, 60 N.W. 2d 105, 109 (Iowa 1953) (upholding conviction of fourteen-year-old found guilty of the second-degree murder of his father, based upon finding that child was not acting in self-defense because the father's punishment of sending the boy to his room to be dealt with later was not unreasonable or abusive, but was corrective in nature).
136. *Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir. 1947), *cert. denied*, 331 U.S. 850 (1947).

Mary C. Jones, aged 16 claimed that her father frequently whipped her without cause and on one occasion he whipped her 25 times before witnesses at the front gate with a switch or small limb, about the size of a thumb¹³⁷ which produced welts on her back. He then went into the house, quickly returned, whipped her five more times then choked her and threw her to the ground, causing a dislocation of her thumb. Her stepmother testified that she was habitually disobedient, had several times stolen money, and was chastised on that occasion for stealing some cents from her father. No permanent injury was sustained.¹³⁸

The jury convicted the father for criminal assault and battery, however the appellate court reversed the conviction and took notice that while the discipline was "needlessly severe," it was not criminal since no permanent injury resulted and the action did not arise from pure malice.¹³⁹

More recently, the Washington Supreme Court asserted that parental rights were not violated when the state granted a fifteen-year-old girl's petition seeking "alternative residential placement."¹⁴⁰ The vague facts recited by the majority indicate only that there had been a great deal of unresolved family conflict and the child had run away on a number of occasions.¹⁴¹ The court acknowledged that even without any claim of physical abuse, or parental unfitness, or neglect, the best interest of the child and the State in protecting the mental and emotional health of the child outweighed the parent's right in this case to the custody and care of their child.¹⁴² The dissent, however, asserted that the basis for the court's decision, and the "sum and substance" of the juvenile's testimony, was the child's belief that she could not communicate with her parents because of the rules they established that she "not use drugs, or associate with those who had furnished drugs, that she not use alcohol, that she not be sexually active, and that she be in at a reasonable hour."¹⁴³

The controversial issues at the core of a parent's exercise of the duty to discipline his or her children are: what type of punishment is reasonable, when is state intervention necessary, and when does state intervention exceed its boundaries? In a highly publicized 1994 case in Woodstock, Georgia, the authorities clearly crossed the line when they arrested Lynn Kivi for felony child abuse for slapping her unruly son in a public supermarket. An employee who witnessed the slap called the police, who promptly appeared, handcuffed Mrs. Kivi, and took her to jail. After an exhaustive investigation of the Kivi family by the authorities, charges were eventually dropped two months later.

137. An application of the rule of thumb, perhaps?

138. *State v. Jones*, 95 N.C. 588 (1886).

139. *Id.* at 592-93.

140. *In re Welfare of Sumey*, 621 P.2d 108 (Wash. 1980).

141. *See id.*

142. *See id.* at 111-12.

143. *Id.* at 114 (Brachtenbach, J., dissenting).

But the emotional anguish this family endured, and the economic losses they suffered, cannot so easily be dismissed.¹⁴⁴

In the same vein, the state of Ohio recently revised its criminal domestic violence statute to include crimes against children. The law provides that "no person shall knowingly cause or attempt to cause physical harm to a family or household member."¹⁴⁵ The first offense is classified as a first-degree misdemeanor, and a second offense is a fifth-degree felony. The language of the statute presents a low standard of what constitutes "physical harm." In state appellate decisions, courts have overturned lower courts which have not considered the defendant's affirmative defense of corporal punishment.¹⁴⁶ Reasonableness may be determined by examining the totality of the circumstances, including the child's age, behavior and response to noncorporal punishment, as well as the location and severity of the punishment.¹⁴⁷

1. *Juvenile Justice—The State, the Parent and the Child*

Although a thorough discussion of the juvenile justice system's historical development and intricacies is far beyond the scope of this Article, the topic does merit discussion in the context of its role in the relationship between the parental rights and the relatively recently recognized rights of children. The component of juvenile justice that this Article will examine is the area of status offenses, also known in some jurisdictions as "PINS" (Persons In Need of Supervision) or "CHINS" (Children in Need of Supervision) statutes.

Historically state intervention in the parent-child relationship in the area of child discipline was not for the purpose of protecting children from unreasonable corporal punishment inflicted by parents, but was justified under the doctrine of *parens patriae* to protect children from self-destructive behaviors. State intervention was also available to parents who felt that they could no longer control their children's behavior.¹⁴⁸

144. Author, *Mother Won't Face Felony Charges for Slapping Son, 9, at Supermarket*, ST. PETERSBURG TIMES, Aug. 2, 1994, at 3A.

145. OHIO REV. CODE ANN. § 2919.25(A) (Anderson 2004).

146. See, e.g., *State v. Hart*, 673 N.E.2d 992 (Ohio App. 3d 1996) (finding that the father's slaps to daughter's face or head could be considered corporal punishment under the totality of the circumstances). See also *State v. Wagster*, No. C-950584, 1996 WL 134538 (Ohio App. 1999) (finding that corporal punishment was reasonable when a twelve-year-old child was out of control and screaming, and her father slapped her on the back to calm her down).

147. See *Hart*, 673 N.E.2d at 995.

148. As early as colonial America when parents were unable to control their children, the government intervened under the authority of "stubborn children" statutes. One such 1654 statute enacted by the House of Deputies of the Colony of Massachusetts Bay stated: "it appears by too much experience that divers children & servants does behave themselves too disrespectively, disobediently, & disorderly

Statutes requiring children to obey their parents, and providing for state-inflicted punishment should they not obey, were enacted not only in Massachusetts, which permitted such a child to be "put to death," but also in Connecticut, Rhode Island, and New Hampshire.¹⁴⁹ The modern equivalent of these antiquated stubborn child statutes are found in every state, in some form or another, through the enactment of juvenile status offense legislation. A status offender is a person who, because of his or her age, comes within the jurisdiction of the juvenile court, after exhibiting behavior that the State has an interest in preventing or eliminating.¹⁵⁰ These behaviors include named offenses like truancy, curfew violations, or repeated attempts to run away from home.¹⁵¹ Some states also include general catch-all language that may apply to disobedient, unruly or incorrigible children, whose behavior is beyond the control of their parents.¹⁵²

Once upon a time, parents could look to the state for help in dealing with errant teens. But many states no longer fulfill that function. The state's refusal to intervene is illustrated through the experience of one New York family as reported in a March 1997 news account.¹⁵³ A 16-year-old girl ran away from home and moved in with an older boyfriend. Her mother contacted the police who informed her that since her daughter was sixteen "she can go wherever she wants, live wherever she wants."¹⁵⁴ Child Protective Services gave the same response. The mother turned to the courts and made an unsuccessful attempt to file a PINS petition. The child did not qualify for PINS because, at age sixteen, she was considered an emancipated minor.

towards their parents, masters, & governours, to the disturbance of families, & discouragement of such parents & governours," and provided for "corporal punishment by whipping, or otherwise," for such behavior. *Commonwealth v. Brasher*, 270 N.E.2d 389, 391 (Mass. 1971) (citing Mass. Bay Records, Vol. III (1644-1657), 35 Mass. Col. Laws (1887 ed.) 27). In *Brasher*, the court upheld a revised version of this original seventeenth-century statute and asserted that it was in the State's interest to insure harmonious relationships between family members, and between the family and the rest of society. The State has authority to "aid the head of a family unit whose reasonable and lawful commands are being disobeyed by children bound to obey them." *Id.* at 394.

149. John R. Sutton, *Stubborn Children: Law and Socialization of Deviance in the Puritan Colonies*, 15 FAM. L.Q. 31 (1981) (citing M. FARRAND, *THE LAWS AND LIBERTIES OF MASSACHUSETTS* (1648) 6 (1929); N. SHURTLEFF, *RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND 1628-1686* 101 (1854)).

150. See Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts To Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41 (1981).

151. See *id.*

152. See *id.*

153. Ed Lowe, *Mother's Life Jarred by Crisis*, *NEWSDAY*, Mar. 7, 1997, at A08.

154. *Id.*

Upon finding that she had absolutely no legal authority to recover her child, the mother made the following telling comment:

"It's too easy for these children. That's why so many of them are pregnant. That's why so many run away. They have the right to. There's nothing wrong with it. The law says there's nothing wrong with it, and there is something wrong with it. There is something wrong. It's ridiculous. She's a child. She's a kid."¹⁵⁵

C. Parental Right to Children's Services and Control of Children's Wages

Colonial families were economically dependent on each member of the family for their mutual survival.¹⁵⁶ Children as young as seven years old worked alongside their parents, the boys with their fathers in the fields, the girls with their mothers performing domestic tasks.¹⁵⁷ It is a common misconception today that children were considered property under the common law.¹⁵⁸ Throughout most of our history, however, children were considered economic assets and their labor was considered a precious resource to parents.¹⁵⁹ The father-child relationship was based upon a mutual set of obligations: the father had the obligation to support and educate the child, and, in return for that support, the father was entitled to the value of the child's services.¹⁶⁰

In America's largely agrarian society, the practice of child labor within the home was never questioned. The beginning of the nineteenth century brought urbanization to America and the public sentiment regarding the role of children began to change.¹⁶¹ As families became smaller, the new urban middle class began to view children in a more positive light, as "innocent beings who were naturally closer to God."¹⁶² These children needed the nurture and protection of their mothers.

While the status of middle class children improved, the status of poor children remained unchanged. Industrialists depended upon the growing population of immigrant children as a source of cheap labor. Some historians have postulated that factory owners preferred these children over adult workers because they were cheaper, more pliant and reliable, and less likely to strike.¹⁶³ In 1904, children's advocates formed the National Child Labor Committee which espoused the belief

155. *Id.*

156. HAWES, *supra* note 78, at 45-46.

157. *Id.*

158. See MASON, *supra* note 51, at xii.

159. See *id.* at xii.

160. See *id.* at 7.

161. See *id.* at 51.

162. *Id.* at 52.

163. See HAWES, *supra* note 78, at 41.

that childhood is sacred, and the exploitation of young children was a degradation to humanity. As one commentator suggested, the National Child Labor Committee became the first national organization devoted to the welfare of American children and thus became the prototype for other protective child advocacy organizations.¹⁶⁴

History dictates the logical inference that the sharp increase in the usage of child labor was probably two-fold: poor, working-class families could better their economic status, and child labor promoted industrial and economic growth for the nation. Children from the upper and middle classes were not working, but children from poor families were, resulting in divided public opinion based upon class lines. Poor parents who had previously maintained control over the wages and services of their children, felt the threat to their economic welfare.¹⁶⁵ Many poor parents struggled to understand this new type of parent-child relationship; one in which the obligations and duties were only one-sided—with parents retaining their duty to support their minor children, but the children having no corresponding obligation to contribute to the family's economic welfare.¹⁶⁶ One by one, and in large part because of the efforts of the National Child Labor Committee, the northern states began enacting various state laws regulating child labor.¹⁶⁷ In the South, particularly in the cotton industry, employers continued to rely heavily on child labor.¹⁶⁸ Some mills worked children as young as six or seven years old for twelve hours per day, with only one thirty-minute break.¹⁶⁹

Children's advocates began a national campaign directed at enacting federal legislation to regulate, and to a large degree prohibit altogether, child labor. The first in a series of various acts was the Keating-Owen Act of 1916. This act prohibited any industry involved in interstate commerce from employing any child under the age of fourteen, and severely limited the labor performed by children ages fourteen through sixteen. In *Hammer v. Dagenhart*,¹⁷⁰ the U.S. Supreme Court declared the Owen-Keating Act unconstitutional, and held that the enactment of child labor laws was a power reserved to the individual states, and thus it did not fall under the federal government's right to regulate interstate commerce. Similarly, in *Bailey v. Drexel Furniture Co.*,¹⁷¹ the Child Labor Tax Law of 1919 was de-

164. See *id.* at 45.

165. See MASON, *supra* note 51, at 106.

166. *Id.*

167. See HAWES, *supra* note 78, at 45-46.

168. See *id.* at 46.

169. See *id.*

170. 247 U.S. 251 (1918). See also *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935) (declaring the National Industrial Recovery Act unconstitutional in so much as it outlawed child labor).

171. 259 U.S. 20 (1922).

clared unconstitutional because a ten-percent income tax levied on employers of child labor was in effect a penalty, not a tax, since the purpose of the act was really to regulate child labor. It was not until 1938 and the passage of the Fair Labor Standards Act, that a federal child labor law was effectively enacted. It, too, was challenged in the U.S. Supreme Court, but this time the act survived constitutional scrutiny.¹⁷²

Today, the general common law rule still gives parents the right to their minor child's services and earnings in return for their parental duty of support,¹⁷³ but such a right is subject to waiver by either failing to assert it or by direct agreement.¹⁷⁴ Today, the remnants of this legal theory may be found in the context of a parent-child loss of consortium claim in a wrongful death suit so that parents may be permitted to recover for the loss of their child's companionship, society and affection.¹⁷⁵

This longstanding parental right has also been diminished by recent reforms that are ostensibly in *the best interest of the child*. Some states have passed special statutes that allow for partial emancipation of minors employed as child entertainers, thus removing the child's right to disaffirm the contract, and removing the parent's right in many cases to control the proceeds of the contract.¹⁷⁶ Under these statutes, and generally with close supervision by a court, a minor's age disability is removed so that child actors, models, and athletes may enter binding, nonvoidable contracts for artistic or creative services, professional athletics, or endorsements of products or services.¹⁷⁷ For example, the Florida Child Performer and Athlete Protection Act of

172. See *U.S. v. Darby*, 312 U.S. 100, 125-26 (1941).

173. See, e.g., *McEntyre v. Jones*, 263 P.2d 313 (Colo. 1953); *Vaupel v. Bellach*, 154 N.W.2d 149 (Iowa 1967); *Rohm v. Stroud*, 194 N.W.2d 307 (Mich. 1972); *Petition of Parks*, 127 N.W.2d 548 (Minn. 1954); *Mitchell v. Mosher*, 362 S.W.2d 532 (Mo. 1962).

174. See, e.g., *Scheller v. Bowery Sav. Bank*, 217 A.D. 506 (N.Y. App. Div. 1995) (holding that mother's informal promise to keep her son's wages in trust to pay for his college education was a waiver of her right to keep the wages).

175. See *Drayton v. Jiffee Chem. Corp.*, 395 F.2d 1280 (5th Cir. 1972); *Reben v. Ely*, 705 P.2d 1360 (Ariz. App. 1985); *Yordon v. Savage*, 279 So.2d 844 (Fla. 1973).

176. New York, California and Florida all have similar statutes. See CAL. CIV. CODE §§ 1556-1557 (West 1982); FLA. STAT. ch. 743.08 (1997); N.Y. GEN. OBLIG. LAW § 3-101 (McKinney 2001); N.Y. ARTS & CULT. AFF. LAW § 35.03 (McKinney 1984). See also Stephen M. Carlisle & Richard C. Wolfe, *Florida's New Child Performer and Athlete Protection Act; Or What To Do When Your Client is a Child, Not Just Acting Like One*, 69 FLA. B.J. 93 (1995) (presenting the analysis that the real beneficiaries of this type of statute appear to be the corporations who hire the child entertainers, since they will be entitled to more effective remedies when a minor breaches the contract, but yet the language of the act invokes the "best interest of the child" as its purpose).

177. See *supra* note 176.

1995,¹⁷⁸ permits either party to petition a court to approve and oversee these types of contractual agreements. The court will appoint a guardian *ad litem* to represent the best interest of the child if the child's parents will benefit financially from the contract, for example when the parent acts as the paid manager or coach of the child.¹⁷⁹ While these statutes are not mandatory, they are certainly designed to provide substantial protections to the corporations engaging the child's services, and most corporations would be foolish not to proceed under the statutes.¹⁸⁰

D. Parental Right to Make Medical Decisions for Minor Children

The general common-law principle has dictated that children under the age of majority are legally incapable of either consenting or refusing consent to medical treatment.¹⁸¹ This principle was based upon the premise that children "are incapable of intelligent decision, as the result of which public policy demands legal protection of their personal as well as their property rights."¹⁸² Thus, parental consent is usually necessary before any medical treatment is administered to a child.¹⁸³ In making medical decisions on behalf of the child, the parents need not consult with the child, and may even choose a course of treatment to which the child objects in certain circumstances.¹⁸⁴

The children's rights movement of the past thirty years has resulted in an increasing body of statutory and case law that recognizes

178. FLA. STAT. ch. 743.08 (1997).

179. *Id.*

180. See statutes cited, *supra* note 176.

181. See Jessica A. Penkower, *The Potential Right of Chronically Ill Adolescents To Refuse Life-Saving Medical Treatment—Fatal Misuse of the Mature Minor Doctrine*, 45 DEPAUL L. REV. 1165, 1166 (1996).

182. *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). While acknowledging that the question of a parental consent requirement had not yet arisen in most states, this court found that a fifteen-year-old's consent to be a skin donor was not valid.

183. There are two general exceptions to the parental consent requirement. First, the emergency exception applies if the child's parent or legal guardian cannot be located and the child's condition requires immediate treatment. See Penkower, *supra* note 180, at 1176 n.64 (citing as an example *Luka v. Lowrie*, 136 N.W. 1106 (Mich. 1912) (finding that under emergency circumstances, defendant physician was justified in performing a foot amputation on an unconscious fifteen-year-old whose parents or guardians were unascertainable)). The second exception applies to minors who have been emancipated, and thus have the capacity to consent to their own medical treatment. States differ on the definition of an emancipated minor, but generally an emancipated minor is "one whose parents have completely surrendered care, custody, and control over the child." Penkower, *supra* note 181, at 1176 n.64. Married minors are usually considered emancipated. *Id.* at 1177.

184. See Cecilia Zalkind, *Having the Final Say: Children and Medical Treatment*, 175 N.J. LAW. 14 (Mar. 1996).

that a child may, under certain circumstances, seek medical treatment without parental consent.¹⁸⁵ The policy reasons underlying these modern deviations from the traditional common law are two-fold: first, the State assertion that it has a compelling interest strong enough to usurp the parent's rights; and second, the recognition that even a child has a fundamental right to privacy in obtaining certain types of medical treatment, particularly abortion, pregnancy, contraception, and treatment related to sexually transmitted diseases.¹⁸⁶ Some modern legal commentators use a tripartite analysis of the compelling or competing interests involved in medical decisionmaking: the interest of the State, the interest of the child, and the interest of the parent.¹⁸⁷ Perhaps in that respective order of descension, the State may exercise its power to intervene when it appears that the parents are not acting in the best interest of the child, or when the State's interest is more compelling than that of the parent.¹⁸⁸

Another modern trend, referred to as the "mature minor doctrine," enables a minor to bypass parental consent requirements. A mature minor is one who either has reached a certain age, or level of maturity, which renders the child capable of understanding the nature of the treatment.¹⁸⁹ The doctrine has been codified in several states and typically allows minors who are deemed "mature" to forego the paren-

185. See CLARK, *supra* note 84, at 335.

186. See Zalkind, *supra* note 184, at 17.

187. See Elizabeth J. Sher, *Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State*, 58 N.Y.U. L. REV. 157, 166 n.39. Sher advocates that courts objectively balance these three interests by examining the child's condition and its relationship to the state interest, the parent's interest and objections, the proposed alternatives, and other influential facts underlying the decision. *Id.* at 166-74. But Sher asserts that there has been "undue deference . . . to parental decisions," and the "broad construction of parental rights at the expense of the child's rights is neither desirable nor constitutionally mandated." *Id.* at 172.

188. See CLARK, *supra* note 84, at 335-37. The State may intervene in the best interest of the child by alleging that the child is neglected by the parent's refusal to provide necessary medical treatment. Courts will generally intervene if the lack of treatment endangers the child's life, and the proposed treatment does not subject the child to substantial risk or suffering. See, e.g., *People In re D.L.E.*, 645 P.2d 271, 272-76 (Colo. 1982) (ruling that parents who refused on religious grounds to seek medical treatment for their epileptic child were guilty of violating state statute); *In re Hamilton*, 657 S.W.2d 426, 429 (Tenn. App. 1983) (ordering chemotherapy and radiation treatments for 12-year-old suffering from Ewing's Sarcoma in spite of father's religious-based objections).

Examples of the State's more compelling interest may arise when public schools require proof of immunization or medical examinations before a child may attend school, or under state statutes that require treatment of infectious diseases. See CLARK, *supra* note 84, at 335-37.

189. See Penkower, *supra* note 181, at 1166.

tal consent and obtain certain types of medical treatment.¹⁹⁰ In other states, even in the absence of a specific statute, courts have applied the mature minor doctrine.¹⁹¹ The major weakness of the mature minor doctrine is the failure of the courts, including the United States Supreme Court, to provide any substantive definition of what constitutes maturity.¹⁹²

1. Abortion, Contraception, and Birth Control Counseling

The most frequent, and certainly one of the most controversial, applications of the mature minor doctrine is seen in situations where minors seek abortion services or access to contraceptives.¹⁹³ In a series of cases decided on the heels of *Roe v. Wade*,¹⁹⁴ the United States Supreme Court has held that a state may not deny a minor access to an abortion,¹⁹⁵ nor access to contraceptives.¹⁹⁶ However, the issue of parental consent for a minor's abortion has been a hotly debated topic ever since *Roe*. The parental consent parameters, as articulated by

190. *Id.* at 1177–78. These also may be referred to as minor-treatment statutes, and typically only apply to treatment for certain diseases or conditions, such as treatment for alcohol and drug abuse, or psychiatric care. For example, see FLA. STAT. ANN. § 394.56(1) (repealed 1998) which allows a minor who is at least twelve-years-old to consent to outpatient mental health services but requires a hearing to assure that the application is voluntary. See Penkower *supra* note 181, at 1178 n.78.

191. See e.g. *Belcher v. Charleston Area Med. Ctr.*, 422 S.E.2d 827 (W. Va. 1992) (recognizing the existence of the mature minor exception to the parental consent requirement).

192. Penkower, *supra* note 181, at 1182.

193. See *id.* at 1181–82.

194. 410 U.S. 113 (1973).

195. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The United States Supreme Court held that a Missouri statute requiring parental consent before a minor could obtain an abortion violated the minor's constitutional rights. While acknowledging that the State has more authority to regulate the activities of children than of adults, the Court could find no significant state interest in conditioning an abortion on the consent of a parent. The Court explicitly rejected the interest of safeguarding "the family unit and of parental authority" by reasoning that allowing a parent to overrule a decision already made by the minor patient and physician will not "serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure." *Id.* at 75. But see *Bellotti v. Baird*, 443 U.S. 622 (1979) (concluding that if a state statute requires a pregnant minor to obtain parental consent, it must also provide an alternative procedure, i.e., some type of judicial bypass mechanism, for the purpose of either demonstrating that the minor is mature enough to make such a decision, or, alternatively, if she is not mature enough, that such a decision would be in her best interests.).

196. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (extending the *Griswold* holding to minors by prohibiting states from denying minors under sixteen years of age access to contraceptives).

the Court in *Bellotti v. Baird*,¹⁹⁷ are the guidelines still in effect today. Thus, a state may not establish a parental consent requirement that effectively allows a parent the power to an "absolute and possibly arbitrary" veto of a minor's right to obtain an abortion.¹⁹⁸ Since *Bellotti*, the Court has upheld a Utah statute that required parental notice rather than consent,¹⁹⁹ and also a Minnesota parental notification statute, but in both cases there was a judicial bypass component to the statute.²⁰⁰

The 1990 Minnesota case, *Hodgson v. Minnesota*,²⁰¹ illustrates the aforementioned tripartite interest analysis, but here the Court applied the analysis a bit differently. Rather than looking at the interest of the State, the parent and the child, Justice Stevens, in a plurality opinion, considered the interest in the welfare of the minor (and the State as protector of that interest), the interest of the parents, and the interest of the *family unit*, and weighed each of those interests accordingly.²⁰² While upholding parental notification requirements in general, the Court struck down the portion of the statute that required notification of both of the minor's parents, because in many cases, such a requirement would cause an undue burden on the minor and furthered no legitimate state interest.²⁰³ Justice Stevens emphasized the longstanding parental interest in the upbringing of their children and the Constitutional and judicial protection of this interest as it has been articulated by the Court over the past century.²⁰⁴ While recognizing that "the State has a strong and legitimate interest in the wel-

197. 443 U.S. 622 (1979).

198. *Id.* at 644.

199. *H.L. v. Matheson*, 450 U.S. 398 (1981).

200. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

201. 497 U.S. 417 (1990).

202. *Id.*

203. *Id.* at 450.

204. The Court stated:

Parents have an interest in controlling the education and upbringing of their children but that interest is a counterpart of the responsibilities they have assumed. The fact of biological parentage generally offers a person only an opportunity to develop a relationship with his offspring. But the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest . . . [T]he family has a privacy interest in the upbringing and education of children and the intimacies of the marriage relationship which is protected by the Constitution against undue state interference The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to the American tradition. We have long held that there exists a private realm of family life which the state cannot enter. Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the governmental interests advanced and the extent to which they are served by the challenged regulation. A natural parent who has demon-

fare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely" and "[t]hat interest . . . justifies state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service."²⁰⁵

2. *Treatment/Testing for Sexually Transmitted Diseases*

One medical condition in which a state has asserted a legitimate interest in encroaching upon parental authority arises in the arena of teenagers and sexually transmitted diseases ("STDs"), particularly HIV. One commentator has opined that when states make HIV testing confidential and freely accessible to youth, the HIV transmission rate among that age group decreases.²⁰⁶ Parents who oppose legislation designed to permit minors to obtain medical tests for sexually transmitted diseases do so for a number of reasons, but the most often heard assertion is that most teenagers are not psychologically prepared to cope with the emotional trauma associated with the testing

strated sufficient commitment to his or her children is thereafter entitled to raise the children from undue state interference. . . .

Id. at 445-47 (citations omitted).

205. *Id.* at 444-45. Justice Kennedy (concurring in part and dissenting in part) would have given even greater weight to the parental right:

The welfare of the child has always been the central concern of laws with regard to minors. The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent Protection of the right of each parent to participate in the upbringing of her or his own children is a further discrete interest that the State recognizes by the statute. The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf. Absent a showing of neglect or abuse, a father possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture. In this century, the common law of most states has abandoned the idea that parental rights are vested solely in father, with mothers being viewed merely as agents of their husbands; it is now the case that each parent has parental rights and parental responsibilities. Limitations have emerged on the prerogatives of parents to act contrary to the best interest of the child with respect to matter such as compulsory schooling and child labor. As a general matter, however, it remains cardinal with us that the custody care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . a State may seek to protect and facilitate the parent-child bond on the assumption that parents will act in their child's best interests.

Id. 483-85 (Kennedy, J., concurring in part and dissenting in part) (citations omitted).

206. Janine P. Felsman, *Eliminating Parental Consent and Notification for Adolescent HIV Testing: A Legitimate Statutory Response to the AIDS Epidemic*, 5 J.L. & POL'Y 339, 345 (1996).

and possible obtainment of positive results.²⁰⁷ Furthermore, if infected, adolescents may continue to engage in the same high-risk behaviors or fail to obtain treatment.²⁰⁸ Thus, many parents assert that parental guidance and support is necessary to reduce the emotional stress, to ensure that adolescents obtain treatment, and to reduce or eliminate the behaviors that caused the disease.²⁰⁹

On the other hand, the compelling state interest argument is predicated on the alarming rate that teenagers are contracting AIDS²¹⁰ and the supposition that a parental consent requirement will reduce the number of teenagers who choose to be tested for these diseases because of the teenagers' fears of parental reprisals and their shame in admitting to parents that they are engaging in high-risk behaviors.

3. *Parental Consent for Commitment to Mental Health Facilities*

As in medical care, a parent also has both a right and a duty to provide psychiatric care for his or her child.²¹¹ Normally, a parent may seek psychiatric care, including institutional care, without seeking the permission of the State.²¹² In *Parham v. J.R.*,²¹³ the United States Supreme Court considered whether a parent may voluntarily commit his or her child to a mental health facility against the wishes of the child. Here, children undergoing treatment in a Georgia state mental hospital brought a class action lawsuit against state mental health officials challenging the constitutionality of the state statute that permitted parents to voluntarily admit their children to state mental health facilities. Claiming Fourteenth Amendment Due Process violations, the children sought declaratory and injunctive relief. Applying the tripartite analysis, the Court examined the child's interest in not being committed, the parents' interest, and obligation, for the health and welfare of the child, and the State's interest in providing mental health treatment to its minor citizens.²¹⁴ Dealing extensively with the parental interest and yielding somewhat to parental authority, the Court began its analysis with the presumption that parents act in the best interests of their children.²¹⁵ While permitting "parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse,"²¹⁶ the Court concluded

207. See *id.* at 359.

208. See *id.* at 360.

209. See *id.*

210. See *id.* at 339. The teenage population is one of the fastest growing groups of people contracting HIV in the United States. See *id.* at 340-41.

211. See CLARK, *supra* note 84, at 343.

212. *Id.*

213. 442 U.S. 584 (1979).

214. See *id.* at 600-04.

215. See *id.* at 604.

216. *Id.*

"that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized."²¹⁷ Thus commitment decisions are also subject to a "physician's independent examination and medical judgment."²¹⁸

The *Parham* decision has been heavily criticized for failing to adequately "protect the child's interests in a situation where those interests would often conflict with those of the parent and therefore would not receive parental protection."²¹⁹ Part of the criticism is no doubt provoked by the Court's extensive discussion of the role of the parent as decisionmaker for the child, and the strong deferential treatment given to parental rights.²²⁰

4. *Caveat: The Irony of the Current Law*

The protection of parental rights, but only under certain circumstances, has been paramount in some states recently. Responding to parental outcries erupting over the rising popularity among teenagers in sporting tattoos over various parts of their bodies, many sympathetic legislators have acted swiftly.²²¹ For example, in 1996, the Arizona Legislature passed a law making it a crime to tattoo anyone under the age of eighteen unless a parent is present,²²² in large part because of the efforts of one Arizona mother whose fifteen-year-old daughter came home with a "black swirly design" tattooed on her stomach.²²³ Not only are parents concerned with protecting their children from the "frivolity of their youth," but they are also concerned with the potential medical risks associated with the practice.²²⁴ The legal irony of the current state of affairs that deems a teenager mature

217. *Id.*

218. *Id.*

219. See CLARK, *supra* note 84, at 344.

220. Justice Burger expounds on the historical concept of family in Western civilization and the history of our jurisprudence in respect to the family unit:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham, 442 U.S. at 602 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 J. KENT, COMMENTARIES ON AMERICAN LAW 190).

221. See ARK. CODE ANN. § 5-27-228 (Michie 1997); CONN. GEN. STAT. § 19a-92a (2003); MICH. COMP. LAWS. § 333.13102 (2001).

222. See ARIZ. REV. STAT. § 13-3721 (2001).

223. See Andrea Petersen, *Parents Spur Laws Against Tattoos for Kids*, WALL ST. J., Sept. 16, 1996, at B1.

224. *Id.* If tattooing is not performed in a sterile environment, the children are at risk for contracting hepatitis, and possibly even HIV. Removal of tattoos requires laser treatment, and may still leave permanent scarring. See *id.*

enough to obtain an abortion without parental consent, but yet too immature by law to obtain a tattoo, must be addressed.

E. Divorced Parents: Individual and Parental Rights Are Subject to Forfeiture

Courts have found, in a variety of contexts, that individual parents should be denied certain rights in cases of divorce. Recently, the effects of secondhand smoke on children have become a factor in child custody decisionmaking.²²⁵ Using the best interest of the child standard, some courts have considered a parent's smoking habits as relevant in making a custody determination.²²⁶ The weight given such a factor will vary depending on the individual facts in each case, but more likely than not, the weight of such a factor will depend upon the personal convictions of the judge.²²⁷ Courts may place even more weight on parental smoking habits when a child has existing health problems that may be exacerbated by exposure to secondhand smoke.²²⁸

Divorced parents may also lose their right to relocate to another city. The effect of losing such a right is intensified when one considers that "job opportunities, economic conditions, the needs of a new spouse, and other factors may make it impossible for many parents to remain indefinitely in the localities in which they had resided before their divorces."²²⁹ While some courts recognize that a relocation benefiting the parent may presumably also benefit the child, based on the general theory that anything making the parent happier improves the child's life, other courts reject such a presumption.²³⁰ For example, in *Levine v. Bacon*,²³¹ a divorced father who was the primary custodial parent, was denied permission by the court to move the child from New Jersey to Florida, because such a move would adversely affect the mother's visitation rights and therefore would not be in the child's best interests.²³² In analyzing a state statute that required the court's permission to remove a minor child of divorced parents from

225. See Michael S. Moorby, *Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority To Clear the Air?*, 12 PACE ENVTL. L. REV. 827 (1995).

226. See *id.* at 834.

227. See *id.* at 835.

228. See e.g., *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (N.Y. Fam. Ct. 1994) (denying joint custody to mother who smoked when one of the children was asthmatic); *Mitchell v. Mitchell*, No. 01-A-019012CV00442, 1991 WL 63674 (Tenn. Ct. App., Apr. 26, 1991) (unpublished decision) (awarding custody of asthmatic child to the non-smoking father over the mother who smoked, and conditioning visitation rights on the mother providing a smoke-free environment for the child).

229. Arnold H. Rutkin, *Away From Home: Children Caught in Middle by Parental Moves*, 78 A.B.A. J. 94 (1992).

230. See *id.*

231. 687 A.2d 1057 (N.J. Super. Ct. App. Div. 1997).

232. See *id.* at 1068.

the jurisdiction, this court was bound by prior New Jersey precedent establishing that "the custodial parent initially must show that there is a real advantage to that parent in the move and that the move is not inimical to the best interests of the children [T]he moving party must show that no detriment to the children will result from the move."²³³ In spite of the fact that Mr. Levine was unable to procure employment in his line of work in New Jersey, the court refused to allow the child to be removed to Florida.²³⁴

IV. THE PENDULUM—OPPOSITE ENDS OF THE SPECTRUM: COMMENTARY ON SOME OF THE MORE EXTREMIST POSITIONS

It should come as no surprise that as children have been granted more and more rights there has been a strong movement to restore parental decisionmaking and authority back to the parents. This ever-growing expansion of children's rights has resulted in an equally vocal parental rights movement. This section will highlight the polarity of the children's rights/parental rights debates and how these debates threaten the integrity of the American family.

A. Do We Really Need a Bill of Rights for Children?

Child advocates reflect two distinct schools of thought: the belief that children must be liberated from their subservient status in American society by the recognition of a complete set of rights similar to the rights of adults (child liberationists)²³⁵ and the belief that society's laws must serve to protect children in schools, in families, and in the

233. *Id.* at 1066.

234. *See id.* at 1059, 1068.

235. One of the more radical and outspoken child liberationists is Richard Farson, author of *RICHARD FARSON, BIRTHRIGHTS* (1974). Farson proposes that children be granted the following rights:

1. The Right to Self-Determination. Children should have the right to decide the matters that affect them most directly . . . [d]ecisions about eating, sleeping, playing, listening, reading, washing, and dressing [i]ncluding the right to choose their associates and goals, and engage in adult activities.
2. The Right to Alternative Home Environments. Self-determining children should be able to choose from among a variety of arrangements: residences operated by children, child-exchange programs, twenty-four-hour childcare centers, and various kinds of schools and employment opportunities.
3. The Right to Responsive Design. Society must accommodate itself to children's size and to their need for safe space
4. The Right to Information. A child must have the right to all information ordinarily available to adults, including, and especially, information that makes adults uncomfortable.
5. The Right to Educate Oneself. Children should be free to design their own education, choosing from among many options the kinds of

juvenile justice system (child protectionists).²³⁶ Child protectionists are not opposed to the concept of rights for children but are more reluctant to grant full-scale autonomy to juveniles.²³⁷

Another more recent, but less extreme, position supports a Bill of Rights for Children recognizing a legal right of children to

receive parental love and affection, discipline and guidance; the right to receive fair treatment from all in authority; the right to be heard and listened to; and the right to be emancipated from the parent-child relationship when that relationship has broken down and when the best interests would be served.²³⁸

American child advocates, not content focusing their efforts solely on the promotion of American children's rights, have taken their debate to the international community. Many countries have found the exhortations of American child advocates not only to be offensive, but also threatening to the cultural foundations of their societies. This was apparent in testimony given before the Senate Foreign Relations Committee in 1996. Christine de Marcellus de Vollmer Herrera, President of the Latin American Alliance for the Family, highlighted several areas of contention that Latin American countries find particularly intrusive.²³⁹ According to Herrera, in preparation for the United Nations International Conference on Population and Development in Cairo, Egypt in 1994, the U.S. delegation fought against parental rights at every opportunity, opposing documents that mentioned "marriage, family values, and morality on sexual unions of all kinds, insisted on [c]onfidentiality and [p]rivacy for children, over

learning experiences they want, including the option not to attend any kind of school

6. The Right to Freedom From Physical Punishment. Children should live free of physical threat from those who are larger and more powerful than they
7. The Right to Sexual Freedom. Children should have the right to conduct their sexual lives with no more restriction than adults
8. The Right to Economic Power. Children should have the right to work, to acquire and manage money, to receive equal pay for work
9. The Right to Political Power. Children should have the right to vote and be included in the decision-making process.
10. The Right to Justice. Children must have the guarantee of a fair trial with due process of law, an advocate to protect their rights against the parents as well as the system, and a uniform standard of detention.

Id.

236. See HAWES, *supra* note 78, at 45-46.

237. See *id.* at 117-18.

238. Henry H. Foster & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

239. *U.S. Influence at United Nations World Conference: Hearings on United Nations World Conferences Before the Senate Foreign Relations Comm.*, 104th Cong. (June 4, 1996) (testimony of Christine de Marcellus de Vollmer Herrera, President, Latin American Alliance for the Family), available at 1996 WL 463842.

and above the rights and responsibilities of the parents.”²⁴⁰ The U.S. employed similar tactics at the Beijing conference.²⁴¹ Herrera, a Venezuelan, lambasted this American-led position as “the most dangerous threat [her] country face[s] . . . the overt offensive to destroy the traditional family and to export the new concept of family to the underdeveloped world. . . . Delinquency and revolution thrive in the world of illegitimacy and fatherlessness spawned by the sexual revolution.”²⁴²

One commentator asserts that upon close examination of the language, the treaty in effect transfers parental authority to the State, or ultimately to the U.N.²⁴³ The United Nations’ Declaration of the Rights of the Child would recognize that children’s rights are independent of parental rights.²⁴⁴ To say that the American position has ignited controversy is an understatement. The American position illustrates nothing more than our profound (and dangerous) cultural bias regarding the rights of children in America.

Another extreme point of view expressed by some children’s rights supporters is the proposition that all parents be licensed by the State before being granted the right to the custody and care of a child.²⁴⁵ One such advocate, Dr. Jack C. Westman, argues that all children should be accorded a legally recognized right to competent parenting.²⁴⁶ Westman bases his argument on four reasons: (1) all individuals, including children, should be free from abuse and oppression; (2) all individuals should be granted equal access to opportunities to develop their potentials in life; (3) to protect the common good of society by regulating activities that are potentially harmful to others and to society; and, (4) the welfare of the next generation is dependent upon the “affectionate attachment bonds” that today’s children form with their parents.²⁴⁷ Westman contends that licensing parents is necessary to elevate the status of parenthood to a privilege and not a right,

240. *Id.*

241. *See id.*

242. *Id.*

243. Jacqueline Joyner Cissell, *Domestic and Global Implications of Children’s Rights*, NAT’L MINORITY POL., Dec. 31, 1995, vol. 7, n.12, at 7. Cissell points to the following to support her assertion: Article 3 empowers the state—not the parents—to determine and pursue the “best interest of the child.” Article 14 guarantees children “freedom of thought, conscience and religion” and authorizes parents to merely “provide direction.” Article 15 grants children “freedom of association” with individuals and organizations of their choice.” Article 16 grants children the unlimited “right to privacy,” the same terminology used by the U.S. Supreme Court when it legalized unrestricted abortion.

244. *See id.*

245. *See* JACK C. WESTMAN, M.D., *LICENSING PARENTS* (1994). Westman credits psychologist Harriet Rheingold as the original proponent of a parental certification requirement in 1973. The idea was also expressed by philosopher Hugh La Follette in 1980. *See id.* at 218.

246. *See id.* at 217–19.

247. *See id.* at 245–46.

thus demonstrating that parenthood is valued and supported by society.²⁴⁸

B. The Other End of the Spectrum: The "Parental Rights Movement"

Numerous parental rights groups, both nationally and locally, have organized in response to the growing list of rights accorded to children by the State, and the ever-increasing involvement by the State in family relationships.²⁴⁹ These groups, comprised mainly of members of the Religious Right, have become the self-appointed advocates of parental rights and family values in America. The sheer strength of their numbers has enabled them to obtain the support of many conservative politicians. Current efforts have centered on the introduction of legislation and/or constitutional amendments in various states aimed at codifying the U.S. Supreme Court rulings recognizing the fundamental right of parents to control the upbringing of their children.²⁵⁰ Additionally, Congress has introduced a bill known as the "Parental Rights and Responsibilities Act" ("PRRA") which would have the same impact at the federal level.²⁵¹

Greg Erkin, in his capacity as executive director of Of the People, a conservative organization directed at promoting parental rights, maintains that parental authority is undermined when the govern-

248. See *id.* at 246.

249. These groups include Of the People, based in Arlington, Virginia, which classifies itself as a nonprofit, nonpartisan parental-rights grassroots organization; Family Research Council, based in Washington D.C., which calls itself a research and educational organization (but based upon their Internet homepage, they are a Christian-based organization); and Focus on the Family, a nonprofit organization founded by Dr. James Dobson in Colorado Springs, which boasts a paid staff of over 1300. Focus on the Family asserts in its Mission Statement that its "primary reason for existence is to cooperate with the Holy Spirit in disseminating the Gospel of Jesus Christ to as many people as possible, and specifically, to accomplish that objective by helping to preserve traditional values and the institution of the family." FOCUS ON THE FAMILY, FOCUS ON THE FAMILY: WHO WE ARE AND WHAT WE STAND FOR (Jan. 1997) (informational pamphlet).

250. A number of states have introduced either constitutional amendments (Alabama, California, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New York, North Dakota, Pennsylvania, South Carolina, Utah, Virginia, and Washington) and/or other bills (Arizona, Indiana, Kansas, Massachusetts, Mississippi, Nebraska, North Dakota, South Carolina, Texas, Virginia, Washington, Wisconsin) addressing parental rights. See David Fisher, Note, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 418-19 nn.151 & 152 (1997).

251. H.R. 1946, 105th Cong. (1st Sess. 1995), was introduced on June 28, 1995. S. 984, 105th Cong. (1st Sess. 1995), was introduced on June 29, 1995. Both bills were sent to committee during the 105th Congress. Because of the significance of these bills to the thesis of this Article, the full text of the Senate version is included in the Appendix.

ment decides what is in the best interest of children.²⁵² He argues that political leaders are sending parents a mixed message by calling for more parental responsibility, while enacting laws that continue to ignore parental rights.²⁵³ Erkin argues that a parental rights amendment will make "explicit in the law that parents aren't just an important influence on children, but in fact are irreplaceable. . . . If parents are irreplaceable, it follows that they must also have rights."²⁵⁴

While these parents' groups have a legitimate and meritorious concern, the manner in which they address it subjects them to two major criticisms. First, the proposed state constitutional amendments use language drawn from two U.S. Supreme Court cases decided in the 1920s, *Meyer v. Nebraska*,²⁵⁵ and *Pierce v. Society of Sisters*.²⁵⁶ Critics contend that the language is too broad and too vague and would only create confusion and conflict.²⁵⁷ Parental rights amendments and similar legislation raises fears that the floodgates of litigation would open, enabling parents to sue for any perceived interference of their right to direct their children's education, medical care, discipline, or religious instruction. The Colorado constitutional amendment granting a parents the inalienable right "to direct and control the upbringing, education, values and discipline of their children" was put before the voters in November, 1996.²⁵⁸ Early on, the majority of voters seemed to support the amendment, but once the opposition organized, the amendment was soundly defeated by a margin of sixteen percent.²⁵⁹

Second, because of the fundamentalist Christian beliefs espoused by these "pro-family" organizations, their political motivations became immediately suspect to the rest of the country.²⁶⁰ Based upon the nature of some of their other causes, such as promoting anti-abortion legislation and prayer in schools to name only a few, many believe

252. See MACK, *supra* note 4, at 303.

253. See *id.*

254. David Bauman, *Conservative Groups Push "Parental Rights,"* TULSA WORLD, Feb. 9, 1996, at A1, available at 1996 WL 2007681.

255. 262 U.S. 390 (1923).

256. 268 U.S. 510 (1925).

257. Robert J. Samuelson, *Sounds Great, Won't Work*, NEWSWEEK, Nov. 4, 1996, at 49.

258. *Id.*

259. See *id.*

260. Opposition to parental rights legislation and constitutional amendments was mobilized by numerous groups including medical associations, churches, children's advocacy groups, and women's rights groups, namely the American Academy of Pediatrics, the American Association of School Administrators, the American Civil Liberties Union, Americans United for Separation of Church and State, the Child Welfare League of America, the Women's Legal Defense Fund, the American Jewish Committee, United Methodist Church, the National PTA, and the National Education Association. See Barbara Dority, "Parental Rights" at the Expense of Children, THE HUMANIST, Sept. 19, 1996, at 37, 38.

that these organizations do not support the doctrine of separation of church and state, but instead want to impose their religious beliefs on the entire country.²⁶¹

V. THE ULTIMATE BEST INTEREST OF THE CHILD ENURES FROM THE PARENTS' REINFORCEMENT

As illustrated by the previous discussion, the polarization of the family values debate has resulted in false choices on both ends of the spectrum—one side has failed to acknowledge “the critical dimension of family breakdown as a fundamental component of problems like poverty and violence” and the other side has too often used its pro-family stance as a “mean-spirited” attack on women’s rights and homosexuals.²⁶² Furthermore, many prominent legal scholars have cautioned against the practice of “rights-mongering” as we attempt to cure the defects of modern family law.²⁶³ These scholars insist that if the law is ever to function properly in the interests of both parents and children, our legal dialogue must move from centering on a battle between individuals with competing interests to one depicting commonality of purpose.²⁶⁴ Family law statutes must be designed so that courts will be obligated to “preserve and support the sacred and indispensable ties that bind parents to each other and to their children.”²⁶⁵

The family institution has long been recognized as the foundation of society upon which the future welfare of the human species depends.²⁶⁶ Western philosophers have expounded upon the concept of family relationships based upon rights, duties, and responsibilities.²⁶⁷

261. See *id.* at 37. Dority argues:

PRRA proponents aren't satisfied with forbidding just their own children to read certain books in the school library; they demand that the books be removed from the library completely, forbidding them to all the children of the school. In other words contrary to what they say, these people don't want to take responsibility for providing guidance and establishing control of what their children see, hear and read. They want the government to enforce their judgments for them—by law—upon everyone's children.

Id.

262. WALLIS, *supra* note 1, at 128.

263. MACK, *supra* note 4, at 303–04. Mack identifies Milton Regan, Mary Ann Glendon, Walter Olson, and Joan G. Wexler as representations of some of these legal scholars.

264. *Id.*

265. *Id.* at 304.

266. See *Miller v. Monsen*, 37 N.W.2d 543, 545 (Minn. 1949).

267. See IMMANUEL KANT, *THE SCIENCE OF RIGHT* paras. 28, 29 (W. Hastie trans.) (1790), wherein Kant discusses corresponding duties of parents and children, *i.e.* parents have duty to preserve and rear their children. Children have right to be preserved and reared by their parents until they are capable of maintaining themselves (para 28) and parents have right to manage, train, and command the child until the child reaches age of emancipation (para 29). See also JOHN LOCKE,

Hegel reasoned that the family is "characterized by love"²⁶⁸ and a person's identity is formed based upon his or her status as a member of the family, not as an independent person.²⁶⁹ The context of the individual having rights need only occur when the family dissolves and the individuals become self-subsistent, *i.e.*, when the children come of age and become recognized as persons in the eyes of the law.²⁷⁰

Our society can reaffirm the critical value of families by recognizing that the family is an inviolable unit, and the primary role of our legal system should be to uphold that inviolability.²⁷¹ Instead of passing legislation further delineating the rights of children as opposed to the rights of parents, legislation must be directed toward the protection of the rights of families. Government programs and policies should be aimed at strengthening and nurturing families, not just providing protections for children. Our family policies should be built upon a system of principles embedded in deep fundamental truths with universal applications that will encompass the diverse religious values represented by this nation's populace.²⁷²

AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. I, ch. II, at 5-13 (New York, E.P. Dutton 1947). Locke stressed the unique emotional, physical and intellectual needs of young children by asserting that the mind of a child was a *tabula rasa*, a "white paper" and it is the role of parents to "govern their children" by establishing early on the "authority of the father." *Id.*

268. G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 110 (T.M. Cox trans., Oxford University Press 1967).

269. *Id.*

270. *Id.* at 110, 118.

271. *Id.* at 118.

272. This is imminently possible, as demonstrated by the work of at least one nonpartisan group. The Council on Families in America, sponsored by the Institute for American Values, functions as a thinktank of professionals from a broad cross-section of disciplines. Its members include authors, scholars, a White House aide, and family therapists. In 1992, the council issued its first report entitled *Eight Propositions on Family and Child Well-Being*. These eight propositions are:

1. In order to develop emotionally, socially and morally, a child requires a strong, warm, lasting, and loving attachment with at least one and preferably two or more adults who are deeply committed to that child's well-being.
2. A basic social purpose of the family is to rear children to become adults who are self-confident, socially responsible, and capable of attachment and trust. The family, in short, carries the key social and moral responsibility for raising the next generation.
3. Today the family is in a crisis that fundamentally threatens the well-being of our nation's children. The marriage bond is steadily weakening. Indeed, marriage is becoming de-institutionalized. Children are spending less time with their parents, especially their fathers. Across the society, children are less valued. . . .
4. The current disintegration of the well-functioning, two-parent family is a central cause of rising individual and social pathology. . . . The evidence is strong and growing that the current generation of children and youth is the first in our nation's history to be less well-off—

Recognized by many as a children's rights advocate, Hillary Rodham Clinton is probably more appropriately characterized as a family rights advocate. Always speaking of children's rights in relation to the family, she has asserted that "unless we have a family policy in this country, then whatever we do on behalf of children in relation to their families will continue to be band-aid medicine, lacking clear objectives and subject to great abuse."²⁷³ She has acknowledged the weakness of the best interest of the child doctrine as being too discretionary, and often subjecting families to state control because of their ethnic or racial background, or because they are financially constrained.²⁷⁴ She has argued for a "family policy in this country that provides stigma-free assistance to families in trouble before their problems reach the extreme point of requiring wholesale intervention."²⁷⁵ Is not this argument the same as stating that the best interest of the parent will enure to the best interest of the child? By improving the status and future for all families, aren't we improving the status of children?

psychologically, socially, economically, and morally—than their parents were at the same age.

5. Family ties were relatively strong in the "traditional nuclear family," with its strict social roles of male breadwinner and female homemaker. . . . Today, because of the importance of female equality and the changing conditions of modern society, that previous model of life-long, separate-sphere gender roles is no longer desirable or possible on a society-wide scale.
6. Yet the model of the two-parent family, based on a lasting, monogamous marriage, remains both possible and desirable. Considering all the alternatives, this family form is by far the most efficacious one for children and for long-term individual and societal well-being.
7. The characteristics of an ideal social environment for child-rearing consists of an enduring, two-biological-parent family that engages regularly in activities together; has many of its own routines, traditions, and stories; and provides a great deal of contact between adults and children. The children have frequent interaction with relatives, with neighbors in a supportive neighborhood, and with their parents' world of work, coupled with no pervasive worry that their parents will break up.

Finally, each of these ingredients comes together in the development of a rich family subculture that has lasting meaning and strongly promulgates such family values as responsibility, honesty, cooperation, and sharing. . . .

8. A major cultural and policy imperative for our time is to increase the proportion of children who grow up with their two married parents and to decrease the proportion of children who do not.

See COUNCIL ON FAMILIES IN AM., INST. FOR AM. VALUES, WP21, EIGHT PROPOSITIONS ON FAMILY AND CHILD WELL-BEING (1991).

273. Hillary Rodham, *Children's Rights: A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21 (Patricia A. Vardin & Ilene N. Brody eds., Teachers College Press 1979).

274. *Id.* at 22-23.

275. *Id.* at 23.

More recently, Senator Clinton has expressed the need to find common ground regarding family-policy debates. She asserts that progress is hindered when political debates only encompass two extreme positions and, more often than not, the majority of people find that they both agree, and disagree, with both sides of the argument, putting themselves somewhere in the middle.²⁷⁶ Arguing that the responsibility for families lies both in the private and public realm, Senator Clinton buttresses her position with a quote from a pastoral letter entitled "Putting Children and Families First," issued following the 1991 United States Catholic Conference:

Government can either support or undermine families as they cope with the moral, social and economic stresses of caring for children. . . . Some emphasize the primary role of moral values and personal responsibility, the sacrifices to be made and the personal behaviors to be avoided, but they often ignore or de-emphasize the broader forces which hurt families, *e.g.*, the impact of economics, discrimination, and anti-family policies.²⁷⁷

A. The Courts and the Right to Family Integrity²⁷⁸

An important and critical step in rebuilding the American family, is the legal recognition of the family as a unit, with certain inviolable, and fundamental rights. These rights may be found in the right of family integrity previously intimated by the United States Supreme Court.²⁷⁹ A legal right to family integrity will combine the rights of parents and children, and it will ensure that a family will be free from unjustified interference by the State.²⁸⁰ Encompassing the reciprocal rights of both parents and children, the right of family integrity is the interest of the parent in the "companionship, care, custody, and management of his or her children, and of the children in not being dislo-

276. HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* 309 (1996).

277. *Id.* at 310.

278. Integrity derives from the Latin word *integritas*. The word refers to "soundness or moral principle and character," and "fidelity and honesty"; it is synonymous with "probity," "honesty," and "uprightness." BLACK'S LAW DICTIONARY 809 (6th ed. 1990). Integrity also is used to describe wholeness, completeness and soundness. In short, integrity encompasses *all* that is good, *i.e.*, honesty, incorruptibility, virtue, fairness, responsibility, and truthfulness.

279. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.") (citing *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

280. MARTIN GUGGENHEIM ET AL., *THE RIGHTS OF FAMILIES: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF FAMILY MEMBERS TODAY* 87, 88 (Carbondale Southern Illinois University Press 1996).

cated from the emotional attachments that derive from the intimacy of daily association with the parent."²⁸¹

B. The Rebuttable Presumption: Parents Are Acting in the Best Interests of Their Children

To preserve the American tradition of family autonomy and to preserve the right to family integrity, there could be national legislation that guarantees the fundamental right to family integrity. This legislation will recognize that strong family relationships are integral to the future of our society; it will ensure that parents have autonomy in decisions regarding child-rearing since they are the best determiners of their children's best interests; and, it will recognize that children's rights cannot be addressed apart from their rights as family members. Legal questions involving children should begin with the rebuttable presumption that parents are acting in their children's best interest. This presumption may only be overcome if the State presents clear and convincing evidence to the contrary, or a compelling state interest that outweighs the parental/familial interest, before the State may interfere in the parent-child relationship. Thus, the State may not interfere in the private realm of family life, unless it is necessary to enforce criminal laws, deter domestic violence, or protect children from serious mental or physical abuse.

Furthermore, a federally recognized right of family integrity will aid in eliminating the judicial confusion surrounding the various decisions emanating from lower-level courts throughout the country.²⁸² Opponents to the parental rights amendment assert that new legislation is unnecessary, and will result in a plethora of new litigation.²⁸³

281. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (quoting *Stanley*, 405 U.S. at 651).

282. For example, the First Circuit has characterized the right to family integrity as being "nebulous." *Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992) (quoting *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988)). The Hawaii Supreme Court rejected a claim by parents that a sex education television series shown to their children in a public school violated their constitutional right to direct their children's upbringing. See *Medeiros v. Kiyosaki*, 478 P.2d 314, 319 (Haw. 1970). The Michigan Supreme Court dismissed the notion of a fundamental parental right when it held that a state teacher certification requirement did not infringe on any fundamental parental right by making it more difficult for parents to home school their children. See *State v. Bennett*, 501 N.W.2d 106 (Mich. 1993). The Third Circuit recharacterized the Supreme Court's parental rights analysis as not "fundamental" rights but as "substantial" rights. See *Halderman v. Penhurst State Sch. & Hosp.*, 707 F.2d 702, 708 (3d Cir. 1983).

283. See *The Parental Rights and Responsibilities Act: Hearing on S. 984 Before the Subcomm. on the Judiciary of the Senate Comm. on the Judiciary*, 104th Cong. 153 (1995) (statement of Margaret F. Brinig, Professor of Law). While applauding the goals that the Parental Rights and Responsibilities Act seeks to achieve, Professor Brinig argues that proposed legislation is not the solution. "The primary losers will be the taxpayers of this country, who will pay the costs of

This argument is overcome by the obvious necessity of legally defining the scope of family rights, and the need to send a message to states and to parents that parents have not only the right but the obligation to be intimately involved in their children's lives. My proposed Family Integrity Bill that follows in Part VII will provide the rebuttable presumption that parents do act in their children's best interests, and familial rights will not be infringed absent a compelling and overriding state interest.

VI. SOME SUGGESTIONS AND DISCUSSION OF THE PARENTS' RIGHTS AND RESPONSIBILITIES ACT

Current efforts have centered on the introduction of legislation and/or constitutional amendments in various states aimed at codifying the U.S. Supreme Court rulings recognizing the fundamental right of parents to control the upbringing of their children.²⁸⁴ Additionally, Congress has introduced a bill known as the "Parental Rights and Responsibilities Act" ("PRRA") which would have the same impact at the federal level.²⁸⁵

First, it has been recognized that parents have responsibilities to their children; however, since the main purpose of the bill is to protect the rights of parents to direct the upbringing of their children, the title of the bill should be limited to the "Parents Rights Act." The parental rights recognize the responsibilities of parents within themselves.

Second, under Section 2(a)(7),²⁸⁶ legislators need to be more precise in the standard that courts apply in terms of when the standard is to be applied and the elements to be applied. Since the United States Supreme Court has failed to establish uniform caselaw regarding these considerations, legislators need to pick up the torch that was dropped by the Supreme Court and provide clear statutory language for states and courts to follow.

Third, Section 2(b)(2) should be stricken as a purpose to this bill. The purpose established in subsection 2 is completely at odds with the

the increased litigation" *Id.* There are two fallacious components to this argument. First, there already is a good deal of litigation in this area of the law. Second, this same argument could be used to counter any new legislation, and then where would we be?

284. See *supra* note 250.

285. H.R. 1946, 105th Cong. (1st Sess. 1995), was introduced on June 28, 1995. S. 984, 105th Cong. (1st Sess. 1995), was introduced on June 29, 1995. Both bills were sent to committee during the 105th Congress. Because of the significance of these bills to the thesis of this Article, the full text of the Senate version is included in the Appendix.

286. Section 2(a)(7) states: "the traditional 4-step process used by courts to evaluate cases concerning the rights of parents described in paragraph (1) appropriately balances the interests of parents, children, and government." Parental Rights and Responsibilities Act, S. 984, 104th Cong. § 2(a)(7) (1995).

purpose of protecting parental rights. Additionally, protecting children from abuse and neglect is such a compelling government interest that legislators passed chapter 67 of Title 42 to the United States Code, entitled Child Abuse Prevention and Treatment and Adoption Reform.²⁸⁷ Therefore, it is unnecessary to provide for that purpose under this Act.

Fourth, Section 3 of the proposed bill provides definitions. Definitions 2 and 3 provide that the terms "child" and "parent" have the meaning provided by state law. However, this does not take into consideration what the meanings of those terms are in situations where states did not provide for that definition. Legislators need to address this situation.

Fifth, Section 6 provides for who may raise a violation of this Act. However, if the true purpose of the Act is to provide for family integrity and parental rights, then legislators would agree that children as well as parents should have the right to bring a claim for violations of this Act, especially since the legislators are purporting to be acting in the best interest of children and parents.

In order for an act to truly protect the fundamental right of a parent to direct the upbringing of a child with limited interference from federal, state, or local governments, the issues and suggestions aforementioned need to be addressed and resolved.

VII. PROPOSED FAMILY INTEGRITY ACT

While Senate Bill 984, The Parental Rights and Responsibilities Bill, purports to focus on parent rights and the best interest of the family, many of its purposes are at odds with each other. For example, the child abuse and neglect purpose established in the Parental Rights and Responsibilities Act negates the focus on parent rights. However, the bill I am proposing seeks to preserve family integrity from a family and parent rights protection perspective, while encompassing the best interests of the children concept. The two purposes of these two bills are quite different. I am proposing the following act, which is focused on parents' rights and family rights with limited state interference. However, I recognize that this bill is still subject to criticism and that while it addresses some of the concerns such as narrowing the focus to parent rights and family integrity, there are other concerns that may be brought to light. What this bill does do is offer steps on the journey to family integrity.

287. 42 U.S.C. §§ 5101-5119 (2004).

A. A Proposal for Reform: A Bill to Preserve the Right of Family Integrity

To protect the fundamental rights of families to function autonomously with limited state interference and to protect the family's constitutional right to privacy and association.

SECTION 1. SHORT TITLE.

This Act may be cited as the Family Integrity Act of 200_.

SECTION 2. FINDINGS AND PURPOSES.

(a) **FINDINGS**—Congress finds that—

- (1) the family is inherently the most valuable resource of the United States;
- (2) the family is the fundamental building block upon which society is based;
- (3) the family is the primary caregiver and source of social learning for children and must be supported and strengthened;
- (4) family rights cannot be accurately characterized as the individual rights of any family member; thus courts must treat the family as an autonomous entity, thereby implicitly recognizing the parental role in protecting the child from state action;
- (5) parents are the best determiners of the best interest of their children, as no one has a more precious stake in the child's well-being than the parents;
- (6) governments should not interfere in the decisions and actions of parents without compelling justification;
- (7) however, when a family is unable to ensure the satisfaction of basic needs of its children and youth, it is the role of society to assist such family; and
- (8) it is the joint and several responsibility of the Federal Government, each State, and the political subdivisions of each State to assist families in obtaining access, to the maximum extent possible, to—
 - (A) the best possible physical and mental health;
 - (B) adequate and safe physical shelter;
 - (C) a high level of educational opportunity;
 - (D) effective training, apprenticeships, opportunities for community services, and productive employment and participation in decisions affecting their lives; and,
 - (E) comprehensive community services that are efficient, coordinated, readily available.

(b) **PURPOSES**—The purposes of this Act are—

- (1) to recognize that parents and children have a mutual interest in the family relationship that has been previously recognized by federal and state statutes and caselaw. These mutual rights shall be referred to as the right of family integrity, a fundamental right implicit in the Ninth and Fourteenth Amendments of the United States Constitution. The right of family integrity shall encompass the rights of parents to direct the upbringing and education of their children, and the rights of children to be raised in a family with limited interference from state, federal and local governments.
- (2) to protect the right of parents to direct the upbringing of their children;
- (3) to recognize that parents have a corresponding duty and responsibility to ensure that their children's basic needs are met to the best of the parents' abilities; such needs encompassing the physical, psychological, and emotional needs, including feeding, clothing, educating, disciplining their children, as well as obtaining medical and dental care and treatment as necessary;
- (4) to preserve the common law tradition that allows parental choices to prevail in health care decisions for a child unless, by neglect or refusal, the parental decision will result in danger to the life of the child or result in serious physical injury to the child;
- (5) to fix a standard of judicial review for the right to family integrity, leaving to the courts the application of the right in particular cases based on the facts of the cases and law as applied to the facts;
- (6) to establish a process to evaluate cases concerning the right of family integrity as described above that—
 - (A) in a proceeding brought by the government against a parent:
 - (i) requires that the government show that it has a compelling interest in the protection and welfare of the child that overrides the parental interest;
 - (ii) and that the governmental interest justifies the interference or usurpation of the parental rights; and
 - (iii) that the method of intervention or usurpation used by the government is the least restrictive means of accomplishing the compelling interest.
 - (B) prohibits a government from wrongfully interfering with or usurping the rights of parents to direct the upbringing of their children absent a compelling governmental interest.

SECTION 3. DEFINITIONS.

- (1) **FAMILY**—The term ‘family’ refers to a group of “individuals who by birth, adoption, marriage, or declared commitment and are mutually entitled to receive and obligated to provide support of various kinds to the fullest extent possible, especially in times of need.”²⁸⁸ The goal of society traditionally has been for children to be raised in a traditional two-parent family, based on a lasting, monogamous marriage, with both parents sharing mutual decisionmaking responsibilities regarding the welfare of their children, but when the goal is not obtainable, other forms of familial relationships will be recognized, supported and equally entitled to protection under this Act.
- (2) **PARENTS**—The term ‘parents’ refers to the male and female who are biologically responsible for having brought the child into the world, but other individuals can be recognized as parents, including adoptive parents, stepparents, or grandparents, by a court.

SECTION 4. PROHIBITION ON INTERFERING WITH OR USURPING THE RIGHT OF FAMILY INTEGRITY.

No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of family integrity.

SECTION 5. STRICT SCRUTINY.

No exception to section 4 shall be permitted, unless the government or official is able to demonstrate, by appropriate evidence, that the interference or usurpation is essential to accomplish a compelling governmental interest and is narrowly drawn or applied in a manner that is the least restrictive means of accomplishing the compelling interest.

SECTION 6. CLAIM OR DEFENSE.

Any parent or child (by a legal representative) may raise a violation of this Act in an action in a Federal or State court, or before an administrative tribunal, of appropriate jurisdictions as a claim or a defense.

288. Ruth Macklin, *Reproductive Technology is Changing the Family*, in *FAMILY IN AMERICA: OPPOSING VIEWPOINTS* 71, 78 (Viqi Wagner ed., 1992). Macklin advocates that a broad definition of family is preferable and suggests using the quoted working definition proposed by Carol Levine.

SECTION 7. DOMESTIC RELATIONS CASES AND DISPUTES BETWEEN PARENTS.

This Act shall not apply to—

- (1) domestic relations cases concerning the appointment of parental rights between parents in custody disputes; or
- (2) any other dispute between parents.

VIII. CONCLUSION

This Article has demonstrated that as children's rights have grown in recent years, family integrity has eroded. In order to balance the scales, and swing the pendulum back toward the center, the rights of parents, in the context of a right to family integrity must be reinstated. A legally recognized right to family integrity is essential before this country can effectively rebuild and strengthen families. By codifying the rights and responsibilities of parents, and recognizing the primacy of the parental role in guiding and nurturing the family, the inviolability of the family unit will be firmly established in American law.

It is the role and duty of legislators and courts to ensure that the best interest of the child standard does not overshadow the rights of parents to decide the upbringing of their children. There is obligation owed to families to protect children and parental rights equally. It is possible to create a more structured standard than the current "best interest of the child" that would encompass parents' reinforcement enuring to the best interest of the child. What is good for the parent is almost always good for the child. It can be a rebuttable presumption.

"[W]hat good mothers and fathers instinctively feel like doing for their babies is usually best after all."

Benjamin McLane Spock²⁸⁹

"Often when a child leaves home to set the world on fire, she/he often returns home for more matches."

Unknown²⁹⁰

289. Benjamin McLane Spock, *Parenting: Trust Yourself*, available at <http://www.drspock.com/article/0,1510,3947,00.html?r=related> (last visited June 3, 2005).

290. A likely adaptation from: "Men who leave home to set world on fire often come back for more matches." Confucius, *quoted in Webster's Online Dictionary, Familiar Quotations: On Fire*, available at http://www.websters-dictionary-online.org/definitions/english/on%5con_fire.html (last visited June 3, 2005).

APPENDIX: S.B. 984—THE PARENTAL RIGHTS AND
RESPONSIBILITIES BILL

To protect the fundamental right of a parent to direct the upbringing of a child, and for other purposes.

SECTION 1. SHORT TITLE.

This Act may be cited as the Parental Rights and Responsibilities Act of 1995.

SECTION 2. FINDINGS AND PURPOSES.

(a) FINDINGS—Congress finds that—

- (1) the Supreme Court has regarded the right of parents to direct the upbringing of their children as a fundamental right implicit in the concept of ordered liberty within the 14th amendment to the Constitution, as specified in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);
- (2) the role of parents in the raising and rearing of their children is of inestimable value and deserving of both praise and protection by all levels of government;
- (3) the tradition of western civilization recognizes that parents have the responsibility to love, nurture, train, and protect their children;
- (4) some decisions of Federal and State courts have treated the right of parents not as a fundamental right but as a nonfundamental right, resulting in an improper standard of judicial review being applied to government conduct that adversely affects parental rights and prerogatives;
- (5) parents face increasing intrusions into their legitimate decisions and prerogatives by government agencies in situations that do not involve traditional understandings of abuse or neglect but simply are a conflict of parenting philosophies;
- (6) governments should not interfere in the decisions and actions of parents without compelling justification; and
- (7) the traditional 4-step process used by courts to evaluate cases concerning the right of parents described in paragraph (1) appropriately balances the interests of parents, children, and government.

(b) PURPOSES—The purposes of this Act are—

- (1) to protect the right of parents to direct the upbringing of their children as a fundamental right;
- (2) to protect children from abuse and neglect as the terms have been traditionally defined and applied in State law, such protection being a compelling government interest;

- (3) while protecting the rights of parents, to acknowledge that the rights involve responsibilities and specifically that parents have the responsibility to see that their children are educated, for the purposes of literacy and self-sufficiency, as specified by the Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972);
- (4) to preserve the common law tradition that allows parental choices to prevail in health care decision for a child unless, by neglect or refusal, the parental decision will result in danger to the life of the child or result in serious physical injury to the child;
- (5) to fix a standard of judicial review for parental rights, leaving to the courts the application of the rights in particular cases based on the facts of the cases and law as applied to the facts; and
- (6) to reestablish a 4-step process to evaluate cases concerning the right of parents described in paragraph (1) that—
 - (A) requires a parent to initially demonstrate that—
 - (i) the action in question arises from the right of the parent to direct the upbringing of a child; and
 - (ii) a government has interfered with or usurped the right; and
 - (B) shifts the burdens of production and persuasion to the government to demonstrate that—
 - (i) the interference or usurpation is essential to accomplish a compelling governmental interest; and
 - (ii) the method of intervention or usurpation used by the government is the least restrictive means of accomplishing the compelling interest.

SECTION 3. DEFINITIONS.

As used in this Act:

- (1) APPROPRIATE EVIDENCE—The term ‘appropriate evidence’ means—
 - (A) for a case in which a government seeks a temporary or preliminary action or order, except a case in which the government seeks to terminate parental custody or visitation, evidence that demonstrates probable cause;
 - (B) for a case in which a government seeks a final action or order; or in which the government seeks to terminate parental custody or visitation, clear and convincing evidence.
- (2) CHILD—The term ‘child’ has the meaning provided by State law.
- (3) PARENT—The term ‘parent’ has the meaning provided by State law.

(4) **RIGHT OF A PARENT TO DIRECT THE UPBRINGING OF A CHILD—**

(A) **IN GENERAL—**The term right of a parent to direct the upbringing of a ‘child’ includes, but is not limited to a right of a parent regarding—

- (i) directing or providing for the education of the child;
- (ii) making a health care decision for the child, except as provided in subparagraph (B);
- (iii) disciplining the child, including reasonable corporal discipline, except as provided in subparagraph (C); and
- (iv) directing or providing for the religious teaching of the child.

(B) **NO APPLICATION TO PARENTAL DECISIONS ON HEALTH CARE—**The term ‘right of a parent to direct the upbringing of a child’ shall not include a right of a parent to make a decision on health care for the child that, by neglect or refusal, will result in danger to the life of the child or in serious physical injury to the child.

(C) **NO APPLICATION TO ABUSE AND NEGLECT—**The term ‘right of a parent to direct the upbringing of a child’ shall not include a right of a parent to act or refrain from acting in a manner that constitutes abuse or neglect of a child, as the terms have traditionally been defined and applied in State law.

SECTION 4. PROHIBITION ON INTERFERING WITH OR USURPING RIGHTS OF PARENTS.

No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent.

SECTION 5. STRICT SCRUTINY.

No exception to section 4 shall be permitted, unless the government or official is able to demonstrate, by appropriate evidence, that the interference or usurpation is essential to accomplish a compelling governmental interest and is narrowly drawn or applied in a manner that is the least restrictive means of accomplishing the compelling interest.

SECTION 6. CLAIM OR DEFENSE.

Any parent may raise a violation of this Act in an action in a Federal or State court, or before an administrative tribunal, of appropriate jurisdiction as a claim or a defense.

SECTION 7. DOMESTIC RELATIONS CASES AND DISPUTES BETWEEN PARENTS.

This Act shall not apply to—

- (1) domestic relations cases concerning the appointment of parental rights between parents in custody disputes; or
- (2) any other dispute between parents.

SECTION 8. ATTORNEYS FEES.

Subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988 (b) and (c)) (concerning the award of attorney's and expert fees) shall apply to cases brought or defended under this Act. A person who uses this Act to defend against a suit by a government described in section 4 shall be construed to be the plaintiff for the purposes of the application of such subsections.